In the

Supreme Court of the United States.

OCTOBER TERM, 1940.

No. 120.

In the Matter of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor.

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of the property of the New York, New Haven and Hartford Railroad Company,

Petitioners,

v.

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, Trustee,

Respondent.

BRIEF FOR THE RESPONDENT.

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IN THE MATTER OF
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR.

HOWARD S. PALMER, JAMES LEE LOOMIS AND HENRY B. SAWYER, TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, PETITIONERS,

v.

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, TRUSTEE, RESPONDENT.

BRIEF FOR THE RESPONDENT.

I.

OPINIONS BELOW.

The opinion of the District Court of the United States for the District of Connecticut has not been officially reported; it appears in the present record on pages 12 to 19 inclusive. The opinion of the Circuit Court of Appeals is reported in 111 F. (2d) 215, and appears on pages 185 to 196 inclusive of the record.

II.

JURISDICTION.

The Circuit Court of Appeals entered its order May 16, 1940 (R., p. 197). No petition for a re-hearing was filed.

The jurisdiction of this Court is invoked by the petition-

ers under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A. Section 347).

The petition for writ of certiorari was filed on June 1, 1940 and the writ was granted October 14, 1940.

III.

THE ISSUE.

The principal issue raised in this case is whether the United States District Court for the District of Connecticut, sitting as a court of bankruptcy in railroad reorganization proceedings under Section 77 of the Bankruptcy Act, had authority prior to the adoption of a plan of reorganization, without the concurrence of the Interstate Commerce Commission, and contrary to the Massachusetts statute and the lawful order of the Massachusetts Department of Public Utilities made thereunder, to authorize the trustees of the estate of the New York, New Haven and Hartford Railroad Company to withhold a part of the compensation expressly prescribed by a statute of the Commonwealth of Massachusetts for the use of the property of The Boston Terminal Company, namely, payments of real estate taxes on the said property of the Boston Terminal, franchise taxes assessed by the Commonwealth of Massachusetts against said Company, and interest upon the bonds of said Company.

IV.

STATEMENT OF THE CASE.

The petitioners are the trustees of the property of the New York, New Haven and Hartford Railroad in railroad reorganization proceedings under Section 77 of the Bankruptcy Act (11 U.S.C.A. 205). The Boston Terminal Company itself, although substantially the adversary party in interest on the respondent's side of the case did not become formally a party to these proceedings for reasons hereinafter explained. The actual respondent is the present trustee under the mortgage indenture securing the bonds of The

Boston Terminal Company. Its predecessor trustee appeared in the proceedings in the District Court and initiated the opposition which resulted in reversal of the order of that court.

In 1888 the Boston and Providence Railroad Corporation leased its property to the Old Colony Railroad Company for a term of 99 years (R., pp. 129-143); and in 1893 the Old Colony leased its property, including its leasehold interest in the Boston and Providence, to The New York, New Haven and Hartford Railroad Company, also for a term of 99 years (R., pp. 72-80). In 1893 the City of Boston was served from the south and west by the lines of the two lessors and by the New England Railroad Company and the Boston and Albany Railroad Company. After the lease of 1893, the properties of the two lessors were operated by the New Haven as parts of a single railroad system, *i.e.*, the New Haven system.

In 1896 the Massachusetts legislature passed a special act (Massachusetts Acts and Resolves, 1896, Ch. 516) incorporating The Boston Terminal Company for the purpose of providing a union passenger station and adequate terminal facilities for railroads entering the southerly part of the City of Boston. Section 2 of the Act fixes the capital stock of the Company at $500,000 and empowers each of the five railroads named in that section, including the New Haven, to subscribe for and hold one fifth of the capital stock of The Boston Terminal Company, and Section 3 requires each of the five named railroads to appoint one member of a board of five trustees, to which board was committed the government and direction of the affairs of The Boston Terminal Company. The Act requires (Sec. 9) all said railroad companies to use the terminal for all their terminal passenger business in Boston, said railroad companies being those companies referred to in Section 2 of the Act, namely the Boston and Albany, the Boston and Providence, the Old Colony, the New England and The New York, New

Haven and Hartford, being lessee of the Old Colony. Section 10 of the Act requires the five named railroads to pay to the Terminal Company for such use the amounts necessary to cover the expenses of the Terminal Company including the interest upon its bonds and taxes. Each of the named railroads is required to pay in the proportion in which it uses, such proportion in default of agreement by the railroads to be determined by the board of railroad commissioners, to which board the Department of Public Utilities is the successor (R., pp. 154, 155). Section 25 of the Act requires the Terminal Company to pay a franchise tax to the Commonwealth upon the value of its capital stock and provides that the real estate of the Terminal Company required to be used by the railroad companies for terminal purposes shall be assessed to and the taxes thereon paid by the said railroad companies. The Act of 1896 was amended in 1921 (Massachusetts Acts, 1921, Ch. 363) to enable the New York Central which had, subsequent to 1896, leased the Boston and Albany to exercise the powers of its lessor. In the meantime, the New England had been merged into the New Haven (R., p. 16; Massachusetts Acts and Resolves, 1905, Ch. 252; Rhode Island Acts and Resolves, 1915, p. 452, Sec. 4). Thus the New Haven and the New York Central became the only users of the terminal, all other companies enumerated in Section 2 of Chapter 516 having been leased or merged. It is stated that use of the terminal over the former New England line terminated prior to these proceedings (R., p. 16).[a]

On July 17, 1931 the Department of Public Utilities of

[a] Nevertheless, use of the terminal by the New Haven trustees over the New England line has been re-commenced. See Report of the Special Commission to Investigate Railroad Transportation Facilities within the Commonwealth, created under Chapter 64 of the Massachusetts Resolves of 1939. This report states on page 60: "Due in the main to the efforts and insistence of this Commission, train service was restored between Boston and Caryville through Medfield Junction and Millis on the lines of the New England on March 10, 1940. This could be done only after the Trustees caused to be relaid tracks which had been ripped up after the order of Judge Hincks in July 1938." The report is dated December 4, 1940. Since printed copies are not yet available, the page reference is to the typewritten copy filed with the General Court of Massachusetts.

Massachusetts acting upon the petition of the New Haven under section 10 of the Act entered the following order (R., p. 155) (Appendix to this brief p. 73):

> "After public hearing, the Department determines that the proportion of use of the South Union Station and facilities be fixed at 70% of use by the New York, New Haven and Hartford Railroad Co. and 30% of use by the New York Central Railroad Co., lessee of the Boston & Albany Railroad Co. Alan Brooks, Executive Secretary."

No reapportionment has been made since that time.

Upon approval, on October 23, 1935, of the petition of the New Haven for reorganization there came into the custody of the United States District Court for the District of Connecticut, as a part of the system of lines operated by the New Haven, the lines of the Old Colony and the Boston and Providence. (Compare *Warren* v. *Palmer*, 310 U.S. 132 [1940].) Continued operation of the system was provided for (R., pp. 44-52) and trustees were appointed (R., pp. 53-56). The District Court for the District of Connecticut entered its order approving Old Colony's petition for reorganization in the New Haven proceedings on June 3, 1936 (R., pp. 81-83). The identical persons who had been serving as trustees of the New Haven were appointed as trustees of the Old Colony by said Court. The Boston and Providence has been in reorganization under Section 77 since August 5, 1938, in the District Court of the United States for the District of Massachusetts (R., pp. 126-128). Both the Old Colony and the Boston and Providence leases have been rejected by the New Haven and Old Colony trustees, respectively (R., pp. 66, 113) and the New Haven trustees have continued to operate both lines for the account of the former lessors pursuant to Section 77 (c) (6) under orders so providing (R., p. 186).

The New Haven and the trustees of the New Haven paid

the prescribed proportion of the taxes on the terminal property due the City of Boston and paid the prescribed proportion of the other charges required to be paid by Sections 10 and 25 of the Act of 1896 and continued to do so until the District Court, on October 30, 1939, granted the New Haven trustees on their petition filed October 19, 1939 an order, No. 398, instructing them to withhold further payment of real estate taxes due the City of Boston upon the terminal property and franchise taxes and bond interest of The Boston Terminal Company (R., p. 20).[1] The trustees of the New Haven, when the petition for Order No. 398 was filed, were in control of three fifths of the stock of The Boston Terminal Company, one fifth being their original subscription under the Act; one fifth having been acquired through the merger of the New England and one fifth through the identity of the New Haven and Old Colony trustees in bankruptcy. Furthermore, the New Haven trustees as such had control of the naming of the two members of the board of five trustees of the Terminal Company whom the New Haven in its original right and as successor to the New England had the right to designate under the Massachusetts statute and these identical persons in their capacities as trustees of the Old Colony had control of naming a third member of the board whom the Old Colony had the right to designate. Thus, at this time three of the five managers of The Boston Terminal Company were subject to the control of the three individuals who were the New Haven trustees. The Boston Terminal Company did not appear at the hearings on the petition for Order No. 398 to object to it, even though the interests of The Boston Terminal Company were

[1] There are pending before the Supreme Judicial Court of Massachusetts proceedings in which is involved the question whether income received by the Terminal Company from other sources than the using railroads is to be considered in determining the total amount which the using railroad companies are required to pay as compensation for the use of the terminal. That particular question of statutory construction is not involved in the instant case and nothing that may be said in this brief is to be construed as a statement that other income received by the Terminal Company may properly be taken into account in determining the total amount which the statute requires the using railroad companies to pay as compensation for the use of the terminal.

adversely and vitally affected.[2] The respondent's predecessor as trustee for the holders of The Boston Terminal Company bonds presented such objections to the petition as were made on behalf of the Terminal Company, and later became a party to the proceedings for the special purpose of appealing from Order No. 398 (R., p. 23).

The District Court, in its memorandum of decision on petition for Order No. 398 (R., p. 12) based its decision principally upon two grounds. First, that following the rejection of the Old Colony lease (R., p. 66) the use of the Boston Terminal was in legal contemplation by the Old Colony and the Boston and Providence and not by the New Haven trustees. Second, that although the New Haven trustees were operating the lines of the Boston and Providence and the Old Colony by virtue of an order entered by the Judge of the District Court, pursuant to Section 77 (c) (6) (R., pp. 44-52), their liability for the payment of the items named in the petition and Order No. 398 ceased when the account of the lessors had been exhausted, and that otherwise Section 77 (c) (6) would be in conflict with the Fifth Amendment to the Constitution of the United States. The Judge of the

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[2] The New Haven trustees and the New York Central, as lessee of the Boston and Albany, had first appropriated all income received by the Terminal Company from other sources, such as rentals from concessions and the like and applied this income to the statutory expenses of the terminal and, after such moneys had been used, had together made up only the balance of the payments for the use of the terminal (including bond interest and franchise taxes and the real estate taxes assessed with respect to the Terminal Company property), so that the total receipts of the Terminal Company had exactly balanced the total payments by it, without leaving any surplus whatever. This practice had continued for many years and therefore, as a direct result of Order No. 398, the Terminal Company was rendered insolvent within the meaning of Section 77 of the Bankruptcy Act. Consequently on November 3, 1939 certain creditors of the Boston Terminal Company filed a petition for its reorganization under Section 77 of the Bankruptcy Act in the United States District Court for the District of Massachusetts. On November 13, 1939 the Terminal Company filed an answer admitting its insolvency, and on November 20, 1939 the District Court of Massachusetts entered an order approving the petition as properly filed and on December 18, 1939 appointed three trustees of the debtor's property. On February 26, 1940 the Interstate Commerce Commission made an order ratifying the appointment of one of these three as sole trustee. On March 7, 1940 the said order was filed in the District Court of Massachusetts and on the same day the trustee qualified. In the meantime, on March 6, 1940 the appeal from Order No. 398 had been argued before the Circuit Court of Appeals for the Second Circuit.

District Court completely ignored the 1931 order of the Massachusetts Department of Public Utilities.

The Circuit Court of Appeals for the Second Circuit reversed the decision of the District Court, holding that Section 77 (c) (6) of the Bankruptcy Act was constitutional; (R., p. 191); construing the provision of 28 U.S.C.A. Section 124a to require the payment by the New Haven trustees of taxes legally assessed under the provisions of the Massachusetts Act of 1896 so long as operation under Section 77 (c) (6) continued; and construing the provision of 28 U.S.C.A. Section 124 as requiring the New Haven trustees to comply with the provisions of the Massachusetts Act of 1896 so long as operation under Section 77 (c) (6) continued. The Circuit Court of Appeals applied Sections 124 and 124a upon the assumption that the New Haven trustees were using the terminal facilities only through their operations of the lines of the Boston and Providence and Old Colony under Section 77 (c) (6) and held that the obligations imposed by the Sections continued so long as operations continued, even though the New Haven trustees were compelled to go for funds to the New Haven estate. The Circuit Court of Appeals also found that the record presented no evidence that the charges for use of the Terminal Company, including taxes and bond interest, were unreasonable (R., p. 196).

V.

SUMMARY OF THE ARGUMENT.

Chapter 516 of the Acts and Resolves passed by the General Court of Massachusetts in the year 1896 required the construction of the Boston Terminal and the use of it by the railroads named therein. The New Haven was one of the railroads so named. It is required that the named railroads use the terminal and pay for such use such amounts as are necessary to pay the expenses of the corporate administration of The Boston Terminal Company and of the mainte-

nance and operation of the station, including insurance, repairs, all taxes required to be paid by the Terminal Company, and interest upon the bonds of the Terminal Company. It is provided that each of the named railroads shall pay for the use of the terminal and the facilities of the station in the proportion in which it has their use.

The Massachusetts Act of 1896 was a valid exercise of the police power of the Commonwealth.

In accordance with the provisions of the Act, the Massachusetts Department of Public Utilities determined, in 1931, that the proportion of use was 70% by the New Haven and 30% by the New York Central, lessee of the Boston and Albany, and this order has never been revised nor has revision been sought by the petitioners.

The New Haven and the New Haven trustees are liable under the Massachusetts Act to pay 70% of all of the enumerated expenses, including bond interest and taxes and this liability, imposed upon the New Haven by the Massachusetts Act, was placed upon the trustees of the New Haven by the provisions of 28 U.S.C.A., Sections 124 and 124a. The obligation of the Massachusetts Act and the order of the Department of Public Utilities under said Act did not end because of the bankruptcy of the New Haven or the disaffirmance by the New Haven of its lease from the Old Colony, and the District Court was without power to enter its Order No. 398, ordering the trustees of the New Haven to withhold payment of bond interest, franchise taxes and real estate taxes.

Even upon the supposition,—which the respondent does not admit,—that upon disaffirmance of the Old Colony lease the New Haven ceased to be a user of the Boston Terminal, nevertheless, the trustees of the New Haven continued to use the terminal in their operation of the lines of the Old Colony and the Boston and Providence under the provisions of Section 77 (c) (6) of the Bankruptcy Act and by virtue of

such use the New Haven trustees are liable to pay to the Boston Terminal Company those expenses of the Boston Terminal not allocated to the New York Central Railroad Company.

Even though it be found that the New Haven trustees are not the users of the terminal and that the use is that of the Boston and Providence and the Old Colony, nevertheless the New Haven trustees are liable for 70% of the terminal rental under the provisions of 28 U.S.C.A. Sections 124 and 124a, the trustees being appointees of a United States court and, as such, conducting the business of the Old Colony and the Boston and Providence.

VI.

ARGUMENT.

A. THE MASSACHUSETTS ACT OF 1896 REQUIRES THE NEW HAVEN AS ONE OF THE RAILROADS NAMED THEREIN TO PAY THAT PROPORTION OF THE EXPENSES OF THE BOSTON TERMINAL COMPANY AS ITS USE BEARS TO THE TOTAL USE OF THE TERMINAL.

The contention of the respondent is that the New Haven trustees are obligated to pay the expenses of The Boston Terminal Company and taxes as prescribed by Chapter 516 of the Acts of 1896. This case and that of *Philadelphia Company* v. *Dipple, et al,* Nos. 242, 243 October Term, 1940, in this Court differ sharply. The sole question in *Philadelphia Company* v. *Dipple* is whether or not the trustees of a corporation in reorganization under the provisions of Chapter X of the Bankruptcy Act are obliged to pay the taxes assessed against certain underliers in the possession of the debtor. In the instant case the relationship of the Terminal Company to the New Haven trustees is not that of an underlier. The Terminal Company is a separate and distinct corporation whose only relationship to the New Haven is that created by the Massachusetts Act of 1896. The problems of payment of a compensation for use equivalent to interest upon the Terminal Company bonds, its

franchise taxes and taxes assessed with respect to its real estate are problems in no way raised in the *Dipple* case. There, there was no question of operation of leased lines under a court order entered pursuant to Section 77 (c) (6) and the case involved no direct statutory liability even remotely comparable to the Massachusetts Act of 1896. Regardless of the decision in that case, the liability of the petitioners in the instant case is fixed by the provisions of the statute of the Commonwealth of Massachusetts and by 28 U.S.C.A. Sections 124 and 124a. To appreciate the significance of the Massachusetts Act it is necessary to examine its pertinent sections in detail.

Chapter 516 of the Acts and Resolves passed by the General Court of Massachusetts in the year 1896 required construction of the Boston Terminal and use of it by the railroads entering Boston from the South and West. (This Chapter and all acts amendatory thereof are herein referred to as the Massachusetts Act of 1896.)

Section 1 of Chapter 516 (Appendix to this brief, p. 67) incorporated The Boston Terminal Company for the purpose of constructing and maintaining a union passenger station in Boston and providing terminal facilities for the several railroads authorized by the statute to hold its stock, and to provide for the accommodation of the public.

Section 2 of Chapter 516 (Appendix to this brief, p. 67) empowered each of five railroads named in said section to subscribe for and hold one-fifth of the capital stock of The Boston Terminal Company, which was fixed at $500,600. Those roads named were the Boston and Albany Railroad Company, the New England Railroad Company, the Boston and Providence Railroad Corporation, the Old Colony Railroad Company, and The New York, New Haven and Hartford Railroad Company, "being lessee of the Old Colony Railroad Company." Under this section the New Haven in its own name, and not as lessee subscribed and paid for one thousand shares out of a total of five thousand,

and now by reason of merger also owns the one thousand shares formerly owned by the New England Railroad Company, merged with the New Haven (R. pp. 7, 16).

Section 3 of Chapter 516 (Appendix to this brief, p. 67) vested "the immediate government and direction of the affairs of said terminal company . . . in a board of five trustees, to be appointed at once on the organization of said company, one of whom shall be appointed by each of said railroad corporations from its directors, to hold office as such trustee at the pleasure of the corporation by whom he is so appointed; any vacancy to be filled in like manner." Thus it will be noted that subsequent to the merger of the New England into the New Haven, the New Haven appointed two of the five managing trustees of The Boston Terminal Company, and that since under Section 77 the same individuals have been appointed trustees of both the New Haven and Old Colony (R., pp. 53, 85, 94) the trustees of the New Haven now appoint a majority of the board of trustees of the Terminal Company. It is also significant to note that although the New Haven trustees now claim the direct obligation of the New Haven to the Terminal Company ceased when the Old Colony lease was rejected, nevertheless the New Haven trustees continue to hold the stock and continue to exercise their power of appointment of trustees of the Terminal Company. It is to be noted that the right of the five railroads each to appoint one of the trustees is independent of their right to own stock.[3]

It is a peculiar circumstance that the petition for Order No. 398 was brought by the trustees of the New Haven

[3] The Board of Trustees of the Boston Terminal Company now are:
Arthur P. Russell, President and Director of the Old Colony and Vice President of the New Haven.
James L. Richards, Director of the New Haven, member of its Executive Committee, member of the Planning Committee of the New Haven in reorganization.
R. L. Pearson, Vice President of the New Haven and General Manager in charge of operations.
James L. Truden, General Manager, New York Central, in charge of Boston and Albany.
Charles W. Mulcahy, trustee in bankruptcy of the Boston and Providence.

Railroad who are the same individuals appointed trustees of the Old Colony Railroad (the New Haven owned a majority of the stock of the Old Colony, R., p. 67) and who in that joint capacity have the control of The Boston Terminal Company. Therefore, at the hearing on the petition for Order No. 398 before the District Court for the District of Connecticut, the trustees of the New Haven were not only the petitioners but in control of the Terminal Company itself. It will be noted that the Terminal Company did not protest the entry of Order No. 398 nor did it appeal this Order. The unusual situation was presented in which the plaintiff was also the defendant; had the present respondent not appeared, the interests of the Terminal Company would have been entirely unprotected.

It is the contention of the petitioners that the Massachusetts Act of 1896 was applicable to the New Haven only so long as it continued to be lessee of the Old Colony and that therefore upon rejection by the New Haven trustees of the Old Colony lease neither the New Haven nor the trustees of the New Haven were any longer bound by the Massachusetts Act. This contention of the petitioners assumes that the addition of the descriptive words "being lessee of the Old Colony Railroad Company" represented such an intention on the part of the Massachusetts legislature. An analysis of the Act, however, demonstrates very clearly that this was not the case but that the legislature clearly intended that the New Haven be given the same rights and be subject to the same obligations as the other four railroads originally named. In the first place, the New Haven was given the right to hold the same number of shares of stock of the Terminal Company as were the other named railroads and also given the same right to appoint its representative to the board of five trustees of the Terminal Company. There are no provisions whatever limiting the responsibility of the New Haven under the Act solely

to the period within which it continues to be lessee of the Old Colony. There are no provisions for the surrender by the New Haven of its stock, nor the termination of its right to appoint a trustee of the Terminal Company when it ceased to be a lessee. In fact the New Haven trustees have not divested themselves of the Terminal Company stock owned by the New Haven, but continue up to this minute to hold it. So also, as has been previously pointed out, the New Haven continues to appoint its representative to the board of trustees of the Terminal Company. The inference must be that the Act intended the New Haven to be bound so long as its corporate existence continued. As the petitioners themselves have stated, the Old Colony, Boston and Providence and New England were named in the Act solely because "conceivably the act might not apply to a lessor railroad if its lease were terminated" (R., p. 158). The New Haven was included generally in the Act by Section 2 and the descriptive words, "lessee of the Old Colony Railroad Company" were added, not to limit the obligation of the New Haven, but to explain wh the Old Colony and Boston and Providence were named at all. If the construction of the Act claimed by the petitioners is correct, it would follow that if the New Haven had merged the Old Colony and the Boston and Providence with itself (as, in fact, the New England was merged) and thereby the New Haven ceased to be a lessee of the Old Colony, then it would be relieved from the requirements of the Act and deprived of the benefits of it. If the argument of the petitioners is correct, the New Haven, having merged the Old Colony might claim that it could then construct a different terminal or use any other terminal facilities than those required by the Massachusetts Act of 1896,—a result diametrically opposed to the intent of the Massachusetts legislature as expressed in the Act: "to provide and operate adequate terminal facilities for the several railroad companies here-

inafter authorized to hold the stock of said Terminal Company, and for the accommodation of the public in connection therewith." (Massachusetts Act of 1896, Section 1, Appendix to this brief, p. 67.) The petitioners argue on page 13 of their brief that the amendment of Chapter 516 made by Chapter 363 of the Acts and Resolves of Massachusetts for the year 1921 (see Appendix to this brief, p. 71) supports the contention that the responsibility of the New Haven was limited to the period within which the New Haven was lessee of the Old Colony. On the contrary, examination of the 1921 amendment leads to precisely the opposite conclusion. The 1921 amendment did not increase the capital stock of the Terminal Company but merely gave to the New York Central the right to acquire that stock originally allocated to the Boston and Albany. It did not place the New York Central in a position comparable to that of the New Haven. It did not give the New York Central the right to nominate a trustee of the Terminal Company on its own behalf similar to the right given to the New Haven, but merely allowed the New York Central to exercise the power of its lessor, the Boston and Albany. Section 2 of Chapter 363 provides: "during the existence of the lease of the Boston and Albany Railroad to the New York Central Railroad Company . . . , the New York Central Railroad Company shall exercise all the powers conferred upon the Boston and Albany Railroad Company under the provisions of said chapter five hundred and sixteen of the acts of eighteen hundred and ninety-six, as amended." Very obviously, the legislature intended to limit the rights of the New York Central Railroad Company under the 1896 Act to the period within which it continued to be lessee of the Boston and Albany. The 1931 order of the Massachusetts Department of Public Utilities (R., p. 155) confirms this viewpoint, as by it on the New Haven's own petition seventy per cent of the use of the Boston Ter-

minal is placed upon the New Haven, without reference to its lessors, while the remaining thirty per cent of use is placed upon the New York Central, lessee of the Boston and Albany, presumably limiting the responsibility of the New York Central to the period in which it remains lessee of the Boston and Albany. If the legislature had intended in 1896 to limit the rights and responsibilities of the New Haven, as in 1921 it did those of the New York Central, it would have been a simple matter to have said so.

Section 4 of the Act (Appendix to this brief, p. 68) authorized the Terminal Company to provide means for carrying out the purposes of the Act by issuing from time to time coupon or registered bonds to such an amount as was necessary and approved by the Board of Railroad Commissioners. The Terminal Company was authorized to mortgage its real estate as security for such bonds. The section further provides that if any mortgage which secures bonds of the Terminal Company is foreclosed and an insufficient sum realized to pay the outstanding bonds, the railroad companies shall be liable to pay any deficiency "in such proportions as may be just and equitable, having regard to the use which they or their lessees may have respectively had of the mortgaged property." The Supreme Judicial Court is given jurisdiction in equity to determine the proportions of such deficiency payable by the respective railroad companies and to compel payment "so that the full payment of the principal and interest of bonds issued under the provisions of this act by the terminal company shall not in any event fail." This same section provides for approval of any mortgage by the Board of Savings Bank Commissioners and makes investment in such bonds legal for savings banks. It also provides that any such mortgage shall be made to a trustee or trustees approved in writing by the Board of Savings Bank Commissioners.

This section is important not only because it specifically authorizes the issue of bonds by the Terminal Company but expressly makes those bonds legal investments for the savings banks of the Commonwealth and thus attempts to surround these bonds with every precaution for their payment both as to principal and interest. It should also be noted that Section 4 of the Act limits the interest rate upon these bonds to four per centum per annum, a further clear indication that the Massachusetts legislature intended these bonds to be for sound investment and not the means for speculation. The attention of the Court has been called to the provision of Section 2 of the Act limiting the capital of the company to only $500,000, to be supplied by the using railroads. By way of contrast it is pertinent to note that the total principal amount of bonds issued by The Boston Terminal Company and now outstanding in the hands of the public is $15,155,000 (R., p. 7). It was, therefore, depositors in savings banks, policy holders in insurance companies and conservative investors seeking safety of investment rather than a large return, who were induced to provide and did provide the money for the erection of the Terminal, and it was not money provided by the railroads.

Sections 5, 6, 7 and 8 of Chapter 516 (Appendix to this brief, pp. 69, 70, 71) empowered the Terminal Company to purchase or take certain real estate and required the Terminal Company forthwith to prepare plans and specifications for approval by the Board of Railroad Commissioners and the Mayor of Boston and thereupon required the Terminal Company to construct the station in accordance with such plans. These sections also required the Terminal Company on completion of the station to make reasonable rules and regulations for the station's use.

Section 9 of Chapter 516 (R., p. 8) requires "all said railroad companies" (referring to the five railroads named

in Section 2) to use the terminal for all of their passenger terminal business in Boston and the Supreme Judicial Court of Massachusetts is expressly given jurisdiction to enforce this provision. It will be noted that Section 9 makes it obligatory for the New Haven to use the Boston Terminal and no other terminal in Boston for its passenger business.

Section 10 of Chapter 516 (R., p. 8) repeats the requirement that the named railroads use the terminal and provides for payment for such use upon a pay-as-you-use basis. This section reads as follows:

> "Section 10. Said railroad companies hereby required to use said union station shall pay to the terminal company for such use, in monthly payments, such amounts as may be necessary to pay the expenses of its corporate administration and of the maintenance and operation of said station, and of the facilities connected therewith and owned by said terminal company, including insurance and all repairs, all taxes and assessments which may be required to be paid by said terminal company, the interest upon its bonds or other obligations issued under the provisions of this act as the same shall become payable, and a dividend, not to exceed four per cent. per annum, upon its capital stock. *Each of said railroad companies shall pay for such use of said station and facilities in the proportion in which it has the use thereof,* the same to be fixed by the written agreement of all of said railroad companies before the completion of said station; and in case they fail thus to agree the board of railroad commissioners shall determine such proportions upon the application of said terminal company or of any of the railroad companies. Said proportions as thus fixed, either by agreement or by the decision of the board of railroad commissioners, may be revised and altered from time to time, either by the written agreement of all of the railroad companies at any time, or by the board of railroad commissioners upon like application, at intervals of not less than three years. *The decisions of the board of railroad commissioners fixing said proportions of payments shall be final and binding upon all of said railroad companies,* and the payments re-

quired to be made by them respectively to said terminal company either by such agreement or decisions shall be deemed a part of their operating expenses, and the supreme judicial court or any justice thereof shall have jurisdiction in equity to compel such payments to be made, either by mandatory injunction or by other suitable process." (Italics supplied.)

It is to be particularly noted that this section obligates all of the named railroads to pay as compensation for their use of the terminal the entire expenses of the Terminal Company, including interest upon its bonds and taxes required to be paid by it.[4] This obligation is positive and without qualification. Each of the named railroads is to pay in the proportion in which each has the use of the terminal, the proportion to be determined by agreement or, in case of failure to agree, to be determined by the Board of Railroad Commissioners, to which Board the Department of Public Utilities is the legal successor (R., pp. 154, 155). The petitioners on page 14 of their brief dismiss very lightly the 1931 order of the Department of Public Utilities, stating that this order did not purport to fix a liability upon the New Haven but merely fixed a proportion of use, leaving the matter of liability to Section 10 of the Act. (This order is set forth in full at p. 73 of the Appendix to this brief.) This position of the petitioners is quite different from that taken by them in their brief before the Supreme Judicial Court of Massachusetts in a collateral matter now pending, in which they state: ". . . We, your petitioners, are paying the 70% of the Terminal expenses, which in 1931 it was decided should be the proportion of the New Haven system. The Boston & Providence are paying the Terminal Company nothing. Were the Boston & Providence Trustees operating their properties, were they a separate user, the statute clearly would apply. But the Boston & Providence are not using their property, nor using the Terminal, nor making any

[4] See note 2 on page 7 of this brief.

payments therefor. . . .'' (R., p. 160.) They also state in their conclusions to the same brief: ''that it is the New Haven Trustees, and not the Boston & Providence Trustees who are using the Boston Terminal, in connection with the operation of the Boston & Providence properties.'' (R., p. 177.)

Under the provisions of Section 10 of the Act ''the decisions of the board of railroad commissioners fixing said proportions of payments shall be final and binding upon all of said railroad companies . . .'' It is obvious that under Section 10 of the Act the order of the Department of Public Utilities was far more than a mere fixing of proportion of use. It was necessarily a determination of what railroads used the terminal and in what proportions. The responsibility of determining proportions of payment was rightly delegated to this administrative board and their order is binding upon the named railroads and expressly enforceable by the Supreme Judicial Court of Massachusetts either by mandatory injunction or by other suitable process. It should also be particularly noted that this section of the statute provides expressly that all the payments made by the using railroads including the interest upon the Terminal Company's bonds and taxes required to be paid by it are to be deemed a part of their operating expense although the obligation placed upon the railroads to pay for use of the terminal is in no way limited to the operating expenses of the Terminal Company but includes all amounts prescribed by the Massachusetts Act of 1896, whatever they may be.

Sections 11 through 24 inclusive of the Act contain various provisions relative to the taking of land and the surrender of previously existing freight and passenger stations. These sections are not pertinent to the issues involved in the present case except as they demonstrate the compulsory nature of the exclusive use of the Terminal.

Section 25 of Chapter 516 reads as follows:

> "Section 25. The terminal company shall pay a franchise tax to the Commonwealth upon the true market value of its capital stock, without any deduction whatever, but its real estate required by this act to be used by said railroad companies shall be assessed to and the taxes thereon shall be paid by said railroad companies, and in the assessment of franchise taxes upon said railroad companies each of them shall be deemed to be the owner of said real estate in the proportion in which it then has the use thereof under this act."

In connection with this section it should be brought to the attention of this Court that under tax laws in force in Massachusetts when the Act of 1896 was passed, and still in force every railroad corporation chartered by or organized under the laws of the Commonwealth of Massachusetts [5] is required to pay to the Commonwealth a franchise tax based upon the fair value of its capital stock after deducting the value of real estate which is locally assessed and taxed.

Public Statutes of Massachusetts (1882), ch. 13, ss. 39, 40.

General Laws of Massachusetts (Ter. Ed.) ch. 63, ss. 53 to 60, inclusive, as amended.

Section 25, however, allows the Terminal Company no deduction from its franchise tax on account of its real estate, but by providing that its real estate shall be assessed to and the taxes thereon paid by the railroad companies named in the Act, rather than to the Terminal Company itself, permits these railroad companies a deduction for the purpose of their franchise taxes of the value of the real estate of the Terminal Company. Rather than providing for the named railroads to pay these taxes to the Terminal Company together with the other items set out in Section 10, to be in turn paid to the City by the Terminal Company, for

[5] The New Haven is a corporation chartered by the Commonwealth of Massachusetts.

franchise tax reasons the real estate taxes are provided to be paid directly by the using railroads in order that they might secure the same tax benefit as if they were the actual owners of the real estate. Payment of the real estate taxes, however, is just as much a part of the obligation of the using railroads to compensate for the use of the terminal as is the payment of any of the items enumerated in Section 10, and is part and parcel of the statutory obligation of the Terminal Company to erect and maintain terminal facilities and the obligation of the railroads to use these terminal facilities exclusively and to pay for such use as determined by the statute of Massachusetts.

B. SUBSEQUENT TO THE LEASE BY THE OLD COLONY TO THE NEW HAVEN IN 1893, THE LINES OF THE BOSTON AND PROVIDENCE AND THE OLD COLONY WERE OPERATED AS INTEGRAL PARTS OF THE NEW HAVEN SYSTEM.

In considering the problems and issues raised in the present case, it will be helpful to consider briefly the background of the New York, New Haven and Hartford Railroad system in so far as it affects Boston and Eastern Massachusetts. Prior to 1893 the shore line of the New Haven ended at Providence and the New Haven possessed no direct route into Boston connecting its shore line division. (*Baker, Formation of the New England Railroad Systems* (1937), pp. 42, 43.) The only roads into Boston from the south which could be used by the New Haven were the lines of the Boston and Providence Railroad from Providence to Boston which were under lease to the Old Colony Railroad Company (R., p. 129) and the lines of the New England Railway which ran through Hartford and Willimantic to Boston, an indirect route and one which passed over many steep grades and other geographical obstacles. (*Baker, op. cit.*, pp. XVI, XVII.) In 1888 the Boston and Providence had been leased to the Old Colony for ninety-nine years (R., p. 129). In 1893 the entire properties and franchises of

the Old Colony were leased to the New Haven for ninety-nine years (R., p. 72) and thereafter the lines of the Old Colony including those of its lessor, the Boston and Providence, were operated by the New Haven and have continued to be so operated ever since. (*Rood, Protecting the User Interest in Railroad Reorganization, Law and Contemporary Problems,* Vol. VII, p. 495 at pp. 498, 499.) After 1893 although the Old Colony and the Boston and Providence continued their corporate existences, they ceased to exist as operating railroads and became no more than bookkeeping devices. On the former lines of the Old Colony and the Boston and Providence, the engines and cars of the New Haven alone operated and the signs, tickets, bills of lading, time tables and conductors all bore and still bear only the name of the New Haven. (*Rood, op. cit.,* p. 499.) It was, in other words, a complete and unified control of the Old Colony lines, including the Boston and Providence, by the New Haven. The lease for ninety-nine years was for the longest term permitted by Massachusetts statutes and a close examination of the lease reveals that the transaction was in its nature a merging of the Old Colony and the Boston and Providence into the New Haven system (R., p. 72).

The lease of March 1, 1893 (R. p. 72) from the Old Colony to the New Haven was of the entire assets of the Old Colony, lock, stock and barrel including the lease of the Boston and Providence and excepting only "the corporate seal, the stockholders' and directors' record books, and the transfer and stock books." (R., p. 73.) The New Haven covenanted to pay as rent a sum equal to dividends at the rate of seven per cent. per annum upon the capital stock of the Old Colony and to pay all taxes assessed upon the Old Colony or upon its capital stock directly to the taxing authorities. It is significant also that the New Haven covenanted that it would exchange nine shares of New Haven stock for ten shares of the stock of the Old Colony (R., p. 76). This exchange provision is customary in a merger or consolidation

and is an unusual provision in a lease. (*Meck and Masten, Railroad Leases and Reorganizations,* 49 Yale L. Jour. 626, 630, n. 17.)

Thus in 1896 when the General Court of Massachusetts passed legislation requiring the construction of a union passenger terminal in Boston and requiring the named railroads to use this terminal, the Old Colony and the Boston and Providence had become by lease parts of the New Haven system; and later control of the New England was acquired by the New Haven. (*Mass. Acts of 1905,* Ch. 252, *Baker, op. cit.*, p. 94., R., p. 16.)

C. THE MASSACHUSETTS ACT OF 1896 IS A VALID EXERCISE OF THE POLICE POWER OF THE COMMONWEALTH AND NOT INCONSISTENT WITH THE INTERSTATE COMMERCE ACT.

At the time the Massachusetts Act of 1896 was passed a state could, under its police power, compel railroads engaged in interstate commerce to build a railroad terminal station within the state and could fix the terms and conditions governing the use of the terminal by such interstate railroads. This power was and is subject only to the general limitations that it must be exercised reasonably and that the charges imposed must not be so great as to be confiscatory.

> *Mayor and Aldermen of Worcester* v. *Norwich & Worcester R.R. Co.*, 109 Mass. 103 (1871).
> *Atchison, Topeka & Santa Fe R.R.* v. *Railroad Commission* 283 U.S. 380, 396 (1931).

This record presents no evidence that the power was exercised unreasonably or that the charges are unreasonable, much less confiscatory (R., p. 196).[6] The district court did

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[6] The Massachusetts Act of 1896 did not go so far as to compel the railroads to build and pay for a terminal. This terminal was built from the money of savings banks, insurance companies and the public which bought the Terminal Company bonds, and the only monetary requirements placed upon the railroads were that they were to pay for their use of the terminal, and were to make up any deficiency if the bond mortgage was foreclosed.

not find that the charges were unreasonable or confiscatory. The Circuit Court of Appeals said: "This record does not present any evidence that the charges are unreasonable or any basis for a declaration that the law is invalid."

In 1896 there were no provisions of the Interstate Commerce Act (U.S.C.A. Title 49, Chapter 1) which qualified this police power. Neither the Transportation Act of 1920 nor the Transportation Act of 1940 took away from the States their power to order interstate railroads to construct and operate terminal stations, but only added the requirement that the Interstate Commerce Commission issue a certificate of convenience and necessity for necessary relocation of tracks (U.S.C.A. Title 49, Chapter 1, section 1, par. 18 to 21; Public Act No. 785, 76th Congress, 3d Session, 1940).

Atchison, Topeka & Santa Fe R.R. v. *Railroad Commission*, 283 U.S. 380 (1931).

The Interstate Commerce Commission has taken the position that the Transportation Act of 1920 gave it no mandatory power to compel railroads to build and operate terminal facilities, and this position has been sustained by this Court.

Los Angeles Passenger Terminal Cases, 100 I.C.C. 421 (1925); 142 I.C.C. 489 (1928).

Railroad Commission of California v. *So. Pacific Co.*, 264 U.S. 331 (1924).

I.C.C. v. *Los Angeles*, 280 U.S. 52 (1929).

It may, therefore, be assumed that the power to compel the erection and operation of terminal facilities by interstate railroads remains with the several states, and with it the power to impose upon the railroads using such terminal facilities the payment of their costs and expenses, and to fix the standard of such payment which in this case is based upon use.

D. THE MASSACHUSETTS ACT OF 1896 IMPOSED AN OBLIGATION TO PAY FOR THE USE OF THE BOSTON TERMINAL ACCORDING TO THE ORDER OF THE MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES.

1. This obligation rested upon the New Haven before its bankruptcy.

This Section D of the brief considers those payments required by the Massachusetts Act of 1896 to be made to the Terminal Company. Real estate taxes which under the Act are paid to the City of Boston are considered in Section E of this brief. Both types of expenses are, nevertheless, required by the Act to be paid as compensation for the use of the terminal.

Section 10 of the Massachusetts Act of 1896 provides that the said railroad companies required to use the Boston Terminal shall pay in monthly payments to the Terminal Company such amounts as may be necessary to pay the expenses of its corporate administration, the expense of maintenance and operation of the station, all insurance and repairs, all taxes and assessments, and interest upon its bonds (R., p. 8). The payment by the Terminal Company of a franchise tax to the Commonwealth of Massachusetts is expressly required by Section 25 of the Act (R., p. 154). The payments by each of the railroads are to be "in the proportion in which it has the use thereof", such proportion to be fixed by written agreement of the railroads, but failing such agreement the board of railroad commissioners (the Department of Public Utilities is its legal successor, R., pp. 154, 155) is given the authority to determine the proportion of use and consequently the percentage of payments. In 1931 the Department of Public Utilities upon the petition of the New Haven ordered "that the proportion of use of the South Union Station and facilities be fixed at 70% of use by the New York, New Haven and Hartford Railroad Co., and 30% of use by the New York Central Railroad Co., lessee of the Boston & Albany Railroad Co." (R., p. 155.) Pursuant to this order the New Haven paid to The

Boston Terminal Company seventy per cent. of its expenses including interest upon its bonds and taxes, and continued to do so until the beginning of the reorganization proceedings.

The New Haven never sought revision of the 1931 order of the Department of Public Utilities.

It seems clear that the delegation by the Act of 1896 of the administrative task of determining the proportion of use of the terminal by the several railroads was a proper delegation. This proportion of use was bound to vary at different times and could not have been determined once and for all by the Act. It was proper for the legislature to delegate to an administrative body the duty of determining from time to time the use made of the terminal by the railroads using it if the railroads failed to agree among themselves, and thus to fix the contributive shares of these roads of the terminal charges. That *use* is a proper standard for the determination of compensation is clearly recognized.

Interstate Commerce Act, Section 3, paragraph (4) (U.S.C.A. Title 49, Chapter 1), *Transportation Act of 1940*, Public Act No. 785, 76th Congress, 3rd Session.

U.S. ex rel. v. *Interstate Commerce Commission*, 71 F. (2d) 336, 340 (App. D. C. 1934), aff'd 294 U.S. 50 (1935).

Therefore, from 1931 at least up to October 23, 1935 (the date of the order of the District Court of the United States for the District of Connecticut approving the petition of The New York, New Haven and Hartford Railroad Company for reorganization under Section 77 of the Bankruptcy Act) the New Haven by virtue of the Massachusetts Act of 1896 and the order of the Department of Public Utilities in conformity with it (R., p. 155) was directly obligated to pay seventy per cent. of the expenses of The Boston Terminal Company including interest upon that company's bonds and franchise taxes payable to the Commonwealth of Massachusetts. From 1931 until its bankruptcy in October 1935 the New Haven in fact obeyed the 1931 order of the Depart-

ment of Public Utilities without objection. Had the New Haven failed to pay, the Terminal Company could under Section 10 of the Act have obtained from the Supreme Judicial Court of Massachusetts a mandatory injunction to compel such payments to be made. That obligation of the New Haven enforceable by the Supreme Judicial Court of Massachusetts was not a secondary obligation of the New Haven arising under its lease of the Old Colony, but a direct obligation of the New Haven itself because of its own use of the terminal. The Terminal Company would not have had any legal right to enforce payment except against those railroads named in the 1931 order of the Department of Public Utilities and in the proportions determined in that order. The Terminal Company could not at least before October 23, 1935 proceed against the Old Colony Railroad or the Boston and Providence Railroad for any part of the money required for the expenses, taxes and bond interest of the Terminal Company.

2. This obligation rested upon the New Haven trustees from the time of bankruptcy to disaffirmance by the New Haven trustees of the Old Colony lease.

The approval on October 23, 1935 by the District Court of the United States for the District of Connecticut of the petition of The New York, New Haven and Hartford Railroad Company for reorganization under the provisions of Section 77 of the Bankruptcy Act did not of itself affect the liability of the New Haven estate to The Boston Terminal Company. For some time after October 23, 1935 the trustees of the New Haven continued to operate the lines of the Old Colony and the Boston and Providence under the provisions of the lease from the Old Colony to the New Haven. The Old Colony lease to the New Haven was not disaffirmed until June 2, 1936 (R., p. 66).[7] While the lease was in force the New Haven trustees remained liable to the Terminal Com-

[7] The Boston and Providence lease to the Old Colony was not disaffirmed until July 19, 1938 (R., p. 113).

pany, however, not because of the leases but because the New Haven estate was *in fact* the user of the Boston Terminal and under the Massachusetts Act of 1896 and the order of the Department of Public Utilities pursuant thereto was legally and directly liable. Neither the Old Colony nor the Boston and Providence had any operating organization or owned any rolling stock or equipment (R., pp. 69, 112) and it was the trains and crews and passengers of the New Haven which used the terminal. While it may be true that the rights of way and rails which led up to the outer boundary of the terminal yards were owned in fee by the Old Colony and Boston and Providence, these rights of way and steel rails did not use the terminal;—it was the New Haven trains which used the terminal for the convenience of New Haven passengers, for the loading and unloading of New Haven express, and for the delivery of the U. S. mails; the revenue therefrom benefiting the New Haven estate.

Since the New Haven trustees continued to operate the business of the New Haven Railroad Company and continued to use the terminal facilities in the same way as they were used prior to the bankruptcy the trustees of the New Haven were bound directly under the Massachusetts Act of 1896. This statute is properly extended by construction to include the trustees of the New Haven. The trustees stand in the place of the corporation itself, they have sole possession of the railroad and its property, and conduct its business and exercise its franchises.

Wall v. *Platt*, 169 Mass. 398 (1897).

However, it is not necessary to rely solely on this contention as the trustees of the New Haven are in any event bound by the provisions of the Massachusetts Act of 1896 by virtue of Section 65 of the Judicial Code (28 U.S.C.A., Section 124).[8]

[8] 28 U.S.C.A. s. 124 (1887), which is sec. 65 of the Judicial Code, states that "Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof".

As this court stated in *Palmer* v. *Massachusetts*, 308 U.S. 79, note 17, p. 90 (1939) "Section 65 of the Judicial Code (36 Stat. 1104, 28 U.S.C., section 124) decisively indicates that Congress did not intend that those who operate a business under the control of a federal court should be immune from the regulatory authority of the several states any more than they are from their taxing power."

Erb v. *Morasch*, 177 U.S. 584 (1900).
Gillis v. *California*, 293 U.S. 62 (1934).
Sullivan v. *Hustis*, 237 Mass. 441 (1921).

It still remained true that, during this period, the Terminal Company, under the unrevised order of the Department of Public Utilities of the Commonwealth of Massachusetts, could not have looked either to the Old Colony or to the Boston and Providence but only to the trustees of the New Haven for the proportions of the payments required by the Massachusetts statute and the said order to be made by the New Haven to the Terminal Company.[9]

No revision of the 1931 order of the Department of Public Utilities was sought by the New Haven trustees.

3. This obligation rested upon the New Haven trustees after disaffirmance by the New Haven trustees of the Old Colony lease.

When, after the Old Colony lease (and later the Boston and Providence lease) was disaffirmed, the New Haven trustees continued to use these lines for the operation of their trains, the New Haven trustees continued to be the actual users of the terminal, (R., pp. 158, 159) and by no reasoning can it be held that the act of disaffirmance of the

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[9] The petitioners on p. 16 of their brief assume that "* * * * mere use of the terminal by petitioners in behalf of Old Colony and Boston and Providence under the Act of 1896 of course obligates the estates of the two former lessors to pay the price fixed for that use." The respondent disagrees with that assumption which was also the assumption of the Judge of the District Court.

lease in some way made the Old Colony and the Boston and Providence railroads, having no operating organizations, owning no rolling stock nor equipment whatever, the users of the terminal in place of the New Haven trustees. Indeed, the orders requiring the New Haven trustees to operate the lines of the Old Colony and of the Boston and Providence were predicated upon the fact that neither of those railroad companies was in a position to operate its own lines. The plain truth is that the New Haven used the facilties of the terminal since it was built in 1898 and that the New Haven trustees have continued to use it and do now use it. Legal relationships between the New Haven, the Old Colony and the Boston and Providence may have changed, and new questions of accounting between them may have arisen, but the physical use of the terminal by the New Haven trustees has continued without interruption or change whatsoever. Railroad trains and passengers have continued to use the terminal, and certainly these trains and passengers have not been those of the Old Colony or the Boston and Providence, which railroads for many years have been mere bookkeeping devices. Indeed, if it be argued by the petitioners that there was a physical cessation by them of the use of the Boston Terminal, it would seem that would constitute an abandonment requiring the prior consent of the Interstate Commerce Commission (*Chicago & Alton R.R. Co.* v. *Toledo, Peoria & Western Ry. Co.*, 146 I.C.C. 171, 179-181 (1928), or possibly the written approval of the Massachusetts Department of Public Utilities after notice and public hearing (Massachusetts General Laws (Tercentenary Edition) ch. 160, ss. 128, 129; Massachusetts Acts of 1901, ch. 330; Appendix to this brief, pp. 72, 73). Since the disaffirmance of the leases, as before disaffirmance, it remains true that the Terminal Company could not have looked and cannot now look to the Old Colony or to the Boston and Providence but only to the New Haven trustees

for the proportions of the payments required by the Massachusetts statute and the order of the Department of Public Utilities to be paid by the New Haven for the use of the terminal. In fact, up to the entry on October 29, 1939 of Order No. 398, the New Haven trustees still continued to comply with the statute and the order made pursuant thereto.

No attempt was made by the New Haven trustees to have the 1931 order of the Department of Public Utilities revised but, on the contrary, the New Haven trustees actively opposed the efforts of the Boston and Providence to bring about such a re-determination (R., p. 156).

On May 25, 1938, the Judge of the District Court confirmed and accepted the report of the Interstate Commerce Commission on segregation of system earnings and expenses (R., p. 96). Previously, on June 2, 1936, the Old Colony lease had been disaffirmed (R., p. 66). Subsequently, on July 19, 1938, the Boston and Providence lease was disaffirmed (R., p. 113). The petitioners, on page 5 of their brief, for some reason state as a fact that the accounting for the use of the Boston Terminal has been accomplished by means of this segregation of expenses and revenue approved by the Interstate Commerce Commission. Throughout the brief (*cf.* petitioners' brief, p. 16) the petitioners assume that the segregation order is in some way an instruction or order respecting the Terminal Company and, in some obscure manner, takes precedence over the 1931 order of the Department of Public Utilities. In making these assumptions, the petitioners disregard the true purpose of a segregation order, which is primarily, as clearly stated in Section 77 (c) (10), of the Bankruptcy Act, to permit "such a segregation and allocation, as the necessities of the case may require, of the earnings and expenses between and to the divisions and parts of the railroad or other property of the debtor which are separately subject to the liens of the

various mortgages or deeds of trust, or are separately subject to lease. . . .".

In Re Chicago, R. I. & P. Rwy. Co., 108 F. (2d) 410 (C.C.A. 7th, 1939).

The segregation order had nothing whatever to do with the obligations owing to The Boston Terminal Company, or to the City of Boston on account of real estate taxes assessed upon the property of The Boston Terminal Company, which obligations were imposed upon the users of the Terminal by the Massachusetts Act of 1896. The Terminal Company neither was nor could have been a party to the proceedings resulting in the segregation order. If anything further were needed to demonstrate the fact that the segregation order did not attempt to instruct the New Haven trustees with reference either to the Boston Terminal charges or to any other similar charges, the language of the Interstate Commerce Commission in their report (*New York, New Haven and Hartford Railroad Company Reorganization*, 224 I.C.C. 723, 725 [1938]) is conclusive:—"Our recommendations herein are in no wise intended to express any views with respect to the use of the results obtained from the application of the formula or the weight to be given such results."

Although the Interstate Commerce Commission approved the segregation formula as "as fair and equitable as the circumstances will permit", nevertheless the application of that formula is not predetermined by it, but on the contrary it has been expressly held by the Circuit Court of Appeals that the Boston and Providence is free to oppose the application of the formula to its own account.

Palmer v. *Warren*, 108 F. (2d) 164, (C.C.A. 2d, 1939), aff'd 310 U.S. 132 (1940).

It is entirely clear, therefore, that not only does the segregation order fail to bind The Boston Terminal Company or the respondent herein but it does not even bind the New

Haven lessors. So far as the Terminal Company is concerned and so far as the Massachusetts Act of 1896 and the order of the Department of Public Utilities made thereunder are concerned, the segregation order has absolutely no effect. Nor is it any concern of the Terminal Company or the respondent herein what bookkeeping method the New Haven trustees may adopt as between themselves and their lessors.

4. The Judge of the District Court in the New Haven proceedings was without authority to enter Order No. 398, ordering the New Haven trustees to withhold payment of bond interest and taxes.

The Act of 1896 and the order thereunder of the Department of Public Utilities were binding upon the New Haven and upon the trustees of the property of the New Haven, and nothing has occurred to relieve them of this responsibility. The obligation was not terminated upon disaffirmance of the Old Colony lease because it did not arise as a part of that lease, but was imposed by the Act of 1896. The only legal action purporting to relieve the New Haven of its obligation to the Terminal Company is order No. 398 of the United States District Court for the District of Connecticut now under review by this Court.

The Massachusetts Act of 1896 and the 1931 order of the Department of Public Utilities, both being in the proper exercise of the police power of the Commonwealth of Massachusetts, cannot be interfered with by a United States Court unless Congress has expressly delegated such power to the United States Court. There is no provision of Section 77 of the Bankruptcy Act which purports to give to the Federal Courts the power to over-ride a state statute validly enacted under the police power of the state, except possibly upon confirmation of a plan of reorganization approved by

the Interstate Commerce Commission, (Section 77, (f)).[10] The Department of Public Utilities of Massachusetts has determined that the New Haven is the user of seventy per cent. of the terminal facilities, and that determination has never been revised. In fact, as has been previously pointed out, the New Haven trustees have resisted an attempt to change that determination (R., p. 156). Order No. 398 in effect nullifies the Massachusetts Act and the order of the Department of Public Utilities under that Act.

It is abundantly clear that for many years, and even long before the enactment of the Massachusetts Act of 1896, the necessary dependence of local interests on local transportation services has properly made the regulation of such services a matter within the jurisdiction of local regulatory boards.

I.C.C. v. *Los Angeles*, 280 U.S. 52 (1929).

The District Court has no power to deal with a matter within the jurisdiction of the State unless Congress gave such power.

Palmer v. *Massachusetts*, 308 U.S. 79, 83 (1939).
Thompson v. *Magnolia Petroleum Company*, 309 U.S. 478 (1940).
Note 50 Yale Law Journal, 165, 168 (1940).

Therefore, if this old established power of the state has been withdrawn by the enactment of Section 77 of the Bankruptcy Act, clear language must be found to justify so radical a change. As is stated by Mr. Justice Frankfurter in *Palmer* v. *Massachusetts*, 308 U.S. 79, at page 84, "There-

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[10] Section 77 (f), 11 U.S.C.A. s. 205 (f):
"* * * Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding * * * *."

fore, in construing legislation this court has disfavoured inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress. *Minnesota Rate Cases*, 230 U.S. 352." There is no specific grant of such power in Section 77 nor does the historic background of this section warrant such an inference.

> *Palmer* v. *Massachusetts*, 308 U.S. 79, pp. 86-89, incl. (1939).

In fact the inference is the exact opposite. Section 77 (f) of the Bankruptcy Act provides that upon confirmation of a plan of reorganization, it shall be put into effect, "the laws of any State or the decision or order of any State authority to the contrary notwithstanding." Moreover, Section 77 (d) provides that no plan shall be confirmed unless first approved by the Interstate Commerce Commission and certified to the court.[11] Only in this limited way and with the prior approval of the Interstate Commerce Commission after public hearings may a judge of a district court abrogate a state law or the order of a state authority. By Order No. 398 the District Judge has taken upon himself sole and uncontrolled power to abrogate a state law, an attempted exercise of a power not delegated by section 77. As stated by Mr. Justice Frankfurter in *Palmer* v. *Massachusetts*, 308 U.S. 79, at page 89,

> "But, in any event, against possible inconveniences due to observance of state law we must balance the feelings of local communities, the dislocation of their habits and the over-riding of expert state agencies by a single judge sitting, as in this case, in another state, removed from familiarity with local problems, and not necessarily gifted with statesmanlike imagination that transcends the wisdom of local attachments."

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[11] Section 77 (d), 11 U.S.C.A. s. 205 (d):

"* * * No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court."

It is submitted, therefore, by the respondent that the United States District Court for the District of Connecticut was entirely without authority to enter its Order No. 398, in the New Haven reorganization proceedings.

The effect of Order No. 398 entered by the District Court is to authorize the use of the Boston Terminal by the New Haven trustees without provision for payment for such use. Section 10 of the Massachusetts Act of 1896 provides that the using railroads shall pay "such amounts as may be necessary to pay the expenses of its corporate administration and of the maintenance and operation of said station, and of the facilities connected therewith and owned by said terminal company, including insurance and all repairs, all taxes and assessments which may be required to be paid by said terminal company . . .". The District Court by Order No. 398 authorized the New Haven trustees to cease payment of bond interest and franchise taxes but left upon the New Haven trustees the duty of paying seventy per cent of all the other expenses of the terminal including the expenses of its corporate administration, the maintenance and operation of the station, insurance and repairs. Thus the result that Order No. 398 sought to bring about was to set aside a fraction of the statutory obligations and leave in full force and effect the balance of the statutory obligations imposed by the very same statute.

Order No. 398 of the District Court is abhorrent to one's sense of propriety. Here, under the order of the Department of Public Utilities the charges for use are apportioned only upon the New Haven in its own right and upon the New York Central as lessee of the Boston & Albany. The Terminal Company is as much bound by that order as the two railroads. The result of the order of the District Court, therefore, is to exempt the only user except the Boston and Albany from paying part of the obligations for terminal use, while requiring it still to pay for other expenses of

use such as corporate administration, maintenance and operation, insurance and repairs. Under the order of the Department of Public Utilities no liability of any kind was imposed upon the Old Colony and the Boston and Providence. Much less was there any apportionment of a part of the charges for use upon those railroads. Hence Order No. 398 was the equivalent of an order that henceforth the Terminal Company should be paid absolutely nothing by anybody for two major items of the rental, namely, franchise taxes and bond interest, except for the 30% payable by the New York Central. As has already been pointed out, the Terminal Company could not sue and collect any part of the terminal charges from either the Old Colony or the Boston and Providence. Since the order of 1931, the Old Colony and the Boston and Providence are strangers so far as the Terminal Company is concerned.[12]

That Congress in enacting Section 77 did not intend to endow the District Court with such authority as it exercised in the instant case seems clear by examining that provision of the Interstate Commerce Act giving to the Interstate Commerce Commission power to require a terminal company to open the use of its facilities to other roads. (Transportation Act of 1940, Section 3(5). Appendix to this brief, p. 66.) Congress in granting that power to the Interstate Commerce Commission carefully guarded the interests of terminal companies by providing that if such use were required, compensation for such use "shall be paid or adequately secured before the enjoyment of the use may be commenced." In this same section, the Interstate Commerce Commission was given power to determine proper compensation for such use but clearly was given no power to authorize use without compensation. The powers assumed by the District Judge acting alone in issuing Order No. 398 are far greater, and are clearly beyond the powers delegated by

[12] See footnote No. 9 on page 30 of this brief.

the Congress, even to its expert administrative agency, the Interstate Commerce Commission. The District Court made no pretense of determining proper compensation, but arbitrarily eliminated certain items prescribed by the Massachusetts statute.

Missouri-Kansas-Texas R. Co. v. *Kansas City Terminal Co.*, 198 I.C.C. 4 (1933).

E. REAL ESTATE TAXES UPON THE PROPERTY IN BOSTON OWNED BY THE TERMINAL COMPANY AND USED FOR TERMINAL PURPOSES WERE PAYABLE BY THE NEW HAVEN TRUSTEES IN THE PROPORTION OF THEIR USE OF THE TERMINAL.

Section 25 of the Massachusetts Act of 1896 provides that the real estate of the Terminal Company required to be used by said railroad companies be assessed to and the taxes thereon paid by said railroad companies (R., p. 154). Except that real estate taxes are payable directly to the City by the railroads, the real estate taxes as part of the compensation for use of the terminal property differ in no way from the items of bond interest, franchise taxes and other expenses discussed above in this brief. The real estate taxes were payable by the New Haven before its bankruptcy; thereafter the New Haven trustees continued to be liable (and actually continued to pay said taxes until the entry of Order No. 398), and this liability was not affected by rejection of the Old Colony and the Boston and Providence leases.

For the year 1939 these taxes were assessed by the Assessors of the City of Boston to the "Boston and Albany Railroad and New York, New Haven and Hartford Railroad Company, *Lesses* [*sic*] of New England Railroad Company, Boston and Providence R.R. Company and Old Colony R.R. Company." (R., p. 179.) Section 25 differs from Section 10 in that proportion of use is not expressly prescribed with reference to real estate taxes. It is fair to assume, however, that the proportion of real estate taxes to be

borne by the named railroads should be measured by the use made by them of the terminal. The language of Section 25 "its real estate required by this act to be used by said railroad companies" warrants no other implication except that use shall be the measure of liability. Furthermore, there being no other provision of the Act allocating the share of the real estate taxes to be borne, it is proper that the standard of use as expressed in Section 10 be also applied with respect to taxes on the real estate of the Terminal Company. Such a construction has always been adhered to by the using railroads. Moreover, this assumption is apparently acquiesced in by the petitioners as in their petition for Order No. 398 they state (R., p. 6) that the proportion of real estate taxes on the terminal property due is seventy per cent. of the total, the same use proportion as determined by the Department of Public Utilities in their 1931 order (R., p. 155). It is, we believe, well established that use is a proper yardstick to measure compensation (Respondent's brief, p. 27).

It is apparent that Section 25 did not contemplate payment of real estate taxes to the City of Boston by the Terminal Company and subsequent repayment to the Terminal Company by the using railroads. It contemplated a payment to the City of such taxes directly by the using railroads. If, however, these taxes are not paid, the City might undertake to claim a lien on the property itself prior to the claims of the bondholders and therefore the liability of the New Haven trustees to the City of Boston may properly be argued by the respondent.

The real estate taxes for 1939 were assessed in accordance with Section 25 of the Act to the Boston and Albany Railroad and New York, New Haven and Hartford Railroad Company (R., p. 179). The addition of the words "*Lesses* of New England Railroad Company, Boston and Providence R.R. Company and Old Colony R.R. Company" are mere

surplusage, they are the words of the local assessors, they are purely descriptive and not even accurately descriptive. The New England had been merged with the New Haven (R., p. 16) the Old Colony lease disaffirmed in 1936 (R., p. 66) and the Boston and Providence lease disaffirmed in 1938 (R., p. 113). At the time of the assessment, the New Haven was the lessee of none of these roads and the Boston and Albany never had been. To treat the reference to the merged New England and the formerly leased Old Colony and Boston and Providence in the assessment of taxes as being a limitation of the scope of the assessment on the New Haven to its capacity as lessee of these other railroads would be to render the assessment a nullity. The presumption is contrary.

In re Lang Body Co., 92 F. (2d) 338, 341, (C.C.A. 6th, 1937) *cert. denied* 303 U.S. 637 (1937).
Union Refrigerator Transit Co. v. *Lynch*, 177 U.S. 149, 154 (1900).

The only legal action purporting to relieve the New Haven trustees of the liability for taxes due the City of Boston for the year 1939 is Order No. 398 of the District Court which is now under review.

It is submitted that the District Court was without power to order payment of these taxes to be withheld. They were required to be paid under the Massachusetts Act of 1896 and by the assessment made under the provisions of Section 25 of that Act. It is not necessary to repeat the arguments heretofore made regarding the power of the Federal courts to over-ride a state statute, validly enacted under the police power of the state. It is sufficient to repeat that a clear delegation of such power by the Congress must be found. That Section 77 of the Bankruptcy Act contains no such terms we believe we have demonstrated. The real estate taxes here in question were assessed directly to the New Haven and the obligation of its trustees is clear, not

because they were lessees but because the statute and the assessment made pursuant to it placed this liability upon the New Haven. The Massachusetts Act of 1896 is properly extended by construction to include the trustees of the New Haven.

Wall v. *Platt*, 169 Mass. 398 (1897).

That this liability is upon the New Haven trustees is confirmed by Section 65 of the Judicial Code (28 U.S.C.A., 124a),[13] which squarely place it upon the trustees of the New Haven. This Court and circuit courts of appeals have supported the position of the respondents.

Boteler v. *Ingels*, 308 U.S. 57 (1939).

Palmer v. *Massachusetts*, 308 U.S. 79, 90, note 17 (1939).

Thompson v. *Louisiana*, 98 F. (2d) 108, (C.C.A. 8th, 1938).

Furthermore, if the New Haven trustees have any complaint with reference to the impropriety of the assessment they have adequate remedies under the Massachusetts statutes. The General Laws of Massachusetts, (Ter. Ed.) Chapter 59, contain provisions for abatements by the assessors upon application and for appeal to the Appellate Tax Board and these provisions are supplemented by Chapter 58A establishing the Appellate Tax Board and also providing for application from that Board to the Supreme Judicial Court of Massachusetts, the decision of which court in a proper case would finally be reviewable by this Court.

The instant case is not one of a lessee's liability for its

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[13] The Act of June 18, 1934, C. 585, 48 Stat. 993 (28 U.S.C.A. Sec. 124a) provides as follows:

"Any receiver, liquidator, referee, trustee or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after the enactment of this Act, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation: *Provided, however*, That nothing in this Act contained shall be construed to prohibit or prejudice the collection of any such taxes which accrued prior to the approval of this Act, in the event that the United States court having final jurisdiction of the subject matter under existing law should adjudge and decide that the imposition of such taxes was a valid exercise of the taxing power by the State or States, or by the civil subdivision of the State or States imposing the same."

lessor's obligation, as erroneously assumed by the Judge of the District Court (R., p. 17). The obligation here involved is that of the New Haven and the New Haven trustees alone.

F. THE OPERATION UNDER SECTION 77 (c) (6) BY THE NEW HAVEN TRUSTEES OF THE LINES OF THE OLD COLONY AND BOSTON AND PROVIDENCE MAKES THE NEW HAVEN TRUSTEES RESPONSIBLE FOR THE PAYMENTS REQUIRED BY THE MASSACHUSETTS ACT OF 1896.

1. The use by the New Haven trustees under Section 77 (c) (6) is that of the New Haven trustees and not that of the Boston and Providence or the Old Colony or their respective trustees.

It is contended by the trustees of the New Haven that upon rejection by them of the Old Colony and the Boston and Providence leases, the direct obligation of the New Haven trustees under the Department of Public Utilities order of 1931 to pay seventy per cent of the expenses of The Boston Terminal Company ended. It is the contention of the respondent, however, that the obligation upon the trustees of the New Haven to pay their proportionate share of the expenses of the terminal remains a direct obligation even if the rejection of the leases is material, because the New Haven trustees are using the terminal in their operations under the provisions of Section 77 (c) (6).[14] The Judge of the United States District Court for the District of Connecticut decreed, after hearing, that it would be impracticable and contrary to public interest for the Old

[14] Section 77 (c) (6), 49 Stat. 911, 915, (11 U.S.C.A. s. 205 (c) (6)):

"If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of section 1 of the Interstate Commerce Act as amended."

Colony or the Boston and Providence to operate their lines after the leases had been disaffirmed by the New Haven (a situation which had been brought about by the New Haven itself), and consequently the trustees of the New Haven were ordered to continue operation for the account of the lessors until abandonment was authorized by the Interstate Commerce Commission (R., pp. 87, 112). Pursuant to this order, the New Haven trustees operated their equipment over the lines of the Boston and Providence and the Old Colony and continued so to operate. The trustees of the New Haven, having been ordered to operate over the lines of the Boston and Providence and the Old Colony and having, in fact, operated their trains over such lines and having, in fact, used the facilities of the Boston Terminal for the loading and discharge of their passengers, and for their express and mail business, cannot discontinue such operation under Section 77 (c) (6) until such discontinuance is authorized by the court with the approval and authorization of the Interstate Commerce Commission. If discontinuance of the operation of the Boston and Providence and the Old Colony should be authorized, and the New Haven should not operate over the New England tracks, then the New Haven trustees might cease to be users of the Boston Terminal and the Massachusetts Department of Public Utilities could properly so find. The remedy of the New Haven trustees would then be to appear before the Department of Public Utilities seeking a revision of their 1931 order or possibly relief might be had from the Interstate Commerce Commission as a part of the abandonment proceedings.

However, the District Court even with the approval of the Interstate Commerce Commission could not authorize the discontinuance of the use of the Boston Terminal and permit the New Haven to exercise some other means of carrying on its terminal business in Boston as such an abandonment order would be in violation of the Massachusetts Act of 1896 requiring the railroads named in that Act

to use the Boston Terminal for all of their terminal passenger business in Boston and this state statute can only be set aside if at all as a part of the plan of reorganization approved by the Interstate Commerce Commission after public hearings and confirmed by the District Court. In no event, does the District Court have authority to order these trustees not to pay for what they use.

2. Even though the use under Section 77 (c) (6) were that of the Boston and Providence and the Old Colony, the New Haven trustees would be liable to pay for such use.

Even if the assumption be made that in fact the Old Colony and the Boston and Providence are the users of the Boston Terminal, though this assumption is exceedingly difficult to make in view of the admitted facts that neither the Old Colony nor the Boston and Providence have any rolling stock or equipment of their own, nevertheless the trustees of the New Haven are obligated under the provisions of Section 77 (c) (6) to pay the prescribed statutory rental to The Boston Terminal Company as the New Haven trustees are operating the lines of the former lessors. It is a definite duty of the New Haven trustees to continue operation of these lines until abandonment of these lines is permitted by the Department of Public Utilities or by the Court, with the approval and authorization of the Interstate Commerce Commission.

Palmer v. *Massachusetts*, 308 U.S. 79, 87, 88 (1939).

The use of the Boston Terminal is an essential and necessary part of the operation of these lines. Obviously the provision of terminal facilities for the passengers of these lines is as essential a service as the heating and lighting of passenger cars. The essential, necessary functions of the New Haven trustees as operators of these three lines

are not concluded by abandoning passengers, the United States mails and baggage and express in the middle of a field. The furnishing of suitable facilities for boarding and leaving trains and for the purchase of transportation and the like is obviously an essential and necessary part of the operation of these three lines and the expense thereof is a necessary expense of operation. It is equally clear that so long as the lessee is obligated to operate the leased lines for the account of the lessor, the lessee must pay the operating expenses of the leased lines. Order No. 398 of the District Court in the New Haven proceedings rests upon no consideration as to whether continued use of the Boston Terminal is or is not in the public interest, but is predicated solely upon the assumption that if a lessor has no funds out of which expenses of its own operation can be paid, although the lessee has a duty under Section 77 (e) (6) to continue operation of the leased lines and although The Boston Terminal Company may be under an obligation to permit the continued use of its facilities in connection with such operation, nevertheless the lessee is not obligated to pay the prescribed cost of such use of the terminal. The interest of the public looking toward uninterrupted service to the communities served by the leased lines (unless the abandonment of the leased lines be authorized by the Interstate Commerce Commission) requires that the expenses of operation be met by the lessee even though the lessee may have to go to its own coffers to meet the expenses, especially since the situation requiring such operation was brought about by the lessee. (*Rood op. cit.*, p. 498, 499.)

It is respectfully submitted that the Judge of the District Court overlooked the primary purpose of Section 77 (e) (6) which is, in the interest of the public, to safeguard continued operation of a railroad.

Warren v. *Palmer*, 310 U.S. 132, 140 (1940).

The remedy of the lessee is before the Interstate Commerce

Commission and not before the Judge of the United States District Court. If the loss in operation of the leased lines be too burdensome, the Interstate Commerce Commission has the power to authorize abandonment of such leased lines. The responsibility has been placed with the Commission by the Congress, and no power has been granted to the Federal courts giving a judge in his discretion the right to authorize abandonment of the leased lines, let alone abandonment of the terminal, or to require the use of the terminal without payment therefor, or with only partial payment. The New Haven trustees have no right under Section 77 (c) (6) to continue that portion of the operation of the lines of the New Haven, the Old Colony and the Boston and Providence involving use of the Boston Terminal for terminal passenger business in Boston and at the same time to withhold payment of current charges arising out of such use.

Compare *Missouri Pacific Ry. Co.* v. *Kansas*, 216 U.S. 262 (1910).

As has been pointed out above, such assumption of power by the District Court is far more than that given by Congress to the Interstate Commerce Commission in giving the Commission power to compel joint use of terminal facilities. Real estate taxes, franchise taxes and bond interest are all a part of the compensation required by the Massachusetts Act of 1896 for use of the terminal property and the New Haven trustees are therefore obligated to pay such charges. That the New Haven trustees, if this be so, may have a first lien on the leased property imposed to secure them is beside the point.

Warren v. *Palmer*, 310 U.S. 132 (1940).

The Judge of the District Court assumed that the bond interest, franchise taxes and real estate taxes were not

charges indispensable to the continuance of the operation of the leased lines (R., p. 17). It is respectfully suggested that the Judge of the District Court confused expenses of and directly chargeable to the leased lines and expenses of The Boston Terminal Company. It is admittedly essential that the New Haven trustees use the facilities of the terminal in operating the leased lines under the provisions of Section 77 (c) (6) and it is not, therefore, pertinent to inquire into whether or not the compensation prescribed by the Massachusetts Act for the use of these terminal facilities is essential or non-essential. In order to use the terminal in connection with the operation of the leased lines it is necessary to pay the compensation for use fixed by the Massachusetts statute and it is no concern of the District Court to inquire into the various items which make up that compensation, there being no evidence that these charges, as a whole, were unreasonable. The District Judge seems to have confused a situation involving merely bond interest, franchise taxes and real estate taxes of the lessors themselves with the real situation, which involves certain items fixed by statute as compensation for the use of an independent terminal which terminal must be used as an incident to the required operation of the lessors' lines.

It is the contention of the respondent that the provisions of Section 77 (c) (6) standing alone obligate the lessee and its trustees to continue the operation of the lessor lines just as before bankruptcy, and that this duty carries with it the obligation to pay the compensation required by the Massachusetts Act of 1896 for the use of the terminal. For the trustees to divest themselves of this statutory obligation, definite legislative sanction must be found. That the intent of Congress was the exact reverse is clear from the provisions of 28 U.S.C.A., Sections 124 and 124a, the applicability of which sections will be discussed in the following section of this brief.

G. EVEN THOUGH THE USE UNDER SECTION 77 (c) (6) WERE THAT OF THE BOSTON AND PROVIDENCE AND THE OLD COLONY, THE NEW HAVEN TRUSTEES WOULD BE LIABLE TO PAY FOR SUCH USE UNDER THE PROVISIONS OF 28 U.S.C.A. SECTIONS 124 AND 124a.

The Judges of the Circuit Court of Appeals did not deem it necessary to pass upon the basic questions argued in sections A to F inclusive of this brief. It is the contention of the respondent, as set out above, that the petitioners are liable for the expenses of the Boston Terminal, including bond interest and taxes, and for the real estate taxes payable to the City of Boston because the New Haven itself and its trustees have used and continue to use the facilities of the terminal; that this use continued without regard to the disaffirmance of the Old Colony lease; and that the New Haven trustees by virtue of 28 U.S.C.A., Sections 124 and 124a are liable directly to the Terminal Company or the City of Boston, as the case may be, because of their own use of the terminal. The respondent contends that the question is not one of Paul being asked to pay the debts of Peter, as is stated by the District Court (R., p. 17), but of Paul being asked to pay his own obligations.

The Circuit Court of Appeals did not deem it necessary to consider whether or not the New Haven trustees were themselves using the terminal as operators of the New Haven, because it held that even though the Old Colony and the Boston and Providence were the companies directly responsible for interest and taxes, nevertheless Sections 124 and 124a were broad enough to cover the case of a railroad operating under Section 77 (c) (6) only for the account of a lessor road. That is, even though trustees of the Pennsylvania Railroad, if it were in reorganization, or trustees of any other railroad not named in the Massachusetts Act of 1896, had operated the Old Colony and the Boston and Providence, they would have been liable to pay the interest, taxes

and other sums required by the Massachusetts Act of 1896. If the question is approached from the viewpoint of the respondent, the fundamental question is one of use by the New Haven itself, a railroad expressly named in the Massachusetts Act, and that therefore by virtue of Sections 124 and 124a the New Haven trustees are liable, regardless of the status of the Old Colony and the Boston and Providence.

However, it is respectfully submitted that the construction by the Circuit Court of Appeals of Sections 124 and 124a is correct.

1. Section 124a requires the payment by the New Haven trustees of the real estate taxes assessed by the City of Boston upon the Boston Terminal property.

Section 124a provides that any trustee authorized by any United States Court to conduct any business shall be subject to all state and local taxes applicable to such business. This section, as has been pointed out above in this brief, has been held applicable to a trustee of a railroad under Section 77.

Thompson v. *Louisiana*, 98 F. (2d) 108 (C.C.A. 8th, 1938).

It has also been applied even against the claim of lack of funds by a trustee in bankruptcy.

Ingels v. *Boteler*, 100 F. (2d) 915 (C.C.A. 9th, 1938), aff'd 308 U.S., 57 (1939).

This section requires only that the taxes in question be applicable to a business conducted by a trustee appointed by an United States Court, and that if they are, the trustee is liable for their payment. Asuming that the real estate taxes owed the City of Boston were owed by the Old Colony and the Boston and Providence, the duties of operation of these roads have been placed upon the New Haven trustees (R., pp. 87, 112). Since operation by the New Haven trustees

must continue until abandonment is authorized by the Interstate Commerce Commission and since such abandonment has not been authorized, the New Haven trustees are conducting the business of the Boston and Providence and of the Old Colony and they are liable for the taxes properly assessed upon these businesses. That the operating profits of the lessor lines are insufficient to meet these taxes does not affect the obligation of the New Haven trustees to pay. As has been hereinbefore stated, the paramount purpose of Section 77 (c) (6) is, in the interest of the public, to prevent a discontinuance of service. The New Haven trustees, being under a duty to continue the business of operating the lessor lines, cannot avoid the payment of the taxes applicable to such business even if the operation results in a loss and makes it necessary for the New Haven to go into its coffers and be left with a claim against the lessors. Section 25 of the Massachusetts Act of 1896 provides that the real estate of The Boston Terminal Company required by that Act to be used by the railroad companies shall be assessed to and the taxes thereon shall be paid by said railroad companies (R., p. 154), and the certificate of assessment by the City of Boston of The Boston Terminal Company's properties shows that this assessment is levied directly against the Boston and Albany Railroad and the New York, New Haven and Hartford Railroad Company, lessees of New England Railroad Company, Boston and Providence R. R. and Old Colony R. R. (R., p. 179). The real estate taxes having been legally assessed by the local authorities, the provisions of 28 U.S.C.A., Section 124a require that the New Haven trustees pay their share of the taxes so long as their use of the Boston Terminal facilities continues whether that use be direct or by the trustees as operators of the Old Colony and the Boston and Providence lines. That this share is seventy per cent. of the total tax we have demonstrated above in this brief at pages 39 and 40.

The petitioners, in their brief (pp. 22-29), discuss at some length the appointment of the trustees under Section 77 of the various railroads and, with considerable torturing of language, argue that operation of the lines of the Old Colony and the Boston and Providence by the trustees of the New Haven is not a conducting of the business of those lines by the New Haven trustees. If operating all the railroad trains that are operated over the lines of the Old Colony and the Boston and Providence by cars and engines bearing the name of the New Haven, the sale of tickets bearing the name of the New Haven and the carrying on of all of the other involved functions of the operation of a railroad does not constitute conducting the business of these railroads, the respondent is at a loss to know what their business is.

When the Congress in Section 124a provided that any trustee conducting any business shall be subject to all state and local taxes, it clearly meant a trustee actually carrying on the business which such bankrupt company was intended to carry on,—in this case, the operation of the lines of railroad. No prolonged quibbling concerning the meanings of "operate" and "conduct" can in any way obscure the plain intent of Congress that trustees actually carrying on and operating the bankrupt's affairs were to be responsible for state and local taxes applicable to that business operation. It is surprising that the petitioners attempt to draw this distinction between operating the lines and conducting the business of the former lessors; the order of the Judge of the United States District Court for the District of Connecticut specifically gave the trustees of the New Haven "the power to operate the business of Old Colony Railroad Company . . ." (R., pp. 86, 87).

The fallacy of the argument of the petitioners regarding the applicability of Section 124a is their assumption that property of one corporation in bankruptcy is being arbitrarily used to pay the taxes assessed to another bankrupt

corporation. This is not that case. Here, as has been pointed out, it is the New Haven trustees who are conducting the business of other bankrupts under a court order entered under the provisions of Section 77 (c) (6) of the Bankruptcy Act, and the New Haven trustees are therefore liable for the payment of local taxes applicable to such business. The cases of *Dulberg* v. *Zankel* and *The Interborough Rapid Transit Company*, cited on pages 24 and 25 of the petitioners' brief, are not in point, for this reason. The petitioners on page 26 of their brief seek the sympathy of this Court because of the extent of the advances made by the New Haven estate to the estates of the Old Colony and Boston and Providence and suggest that the Judge of the District Court properly exercised his discretion in not requiring the New Haven trustees to advance further funds for the accounts of the Old Colony and the Boston and Providence. It is not a matter in the discretion of a district court as to whether the specific mandate of Congress should or should not be obeyed. Many years ago, the New Haven entered upon certain lease obligations of its own free will. In view of these obligations and because of the public interest involved, even though the Congress permitted disaffirmance of the leases, the permission to disaffirm carried with it an obligation to continue operation in the interests of the public until abandonment of such operation was authorized with the approval of the Interstate Commerce Commission. As an incident of such operation the New Haven trustees are required by Section 124a to pay the taxes assessed upon the business which they operate. The decision in *In re Reorganization of Pittsburgh Rys. Co.* 111 F. (2d) 932 (C.C.A. 3d, 1940) does not conflict with the argument. (Certiorari was granted in this case and it is now Nos. 242 and 243, October Term, 1940 under the name of *Philadelphia Company* v. *Dipple et al.*) In the Pittsburgh Railway Company's case, "none of the taxes . . . were assessed against the debtor or its subsidiary, and none bears any relation to the properties

leased by the underliers to the debtor. Each is a tax upon the income of the underliers or upon their capital stock or securities." The only liability of the debtor to pay these taxes was contractual, and there was no question of operation of leased lines under the express provisions of a court order entered pursuant to Section 77 (c) (6) of the Bankruptcy Act. The distinction between the two cases is clear and fundamental. Whether or not in the *Pittsburgh Rys.* case the bankruptcy trustees were operating the business of certain underlying companies, it is clearly beyond doubt that, in the instant case, the New Haven trustees are conducting and operating the business of the Old Colony and the Boston and Providence, and doing so by virtue of Section 77 (c) (6). The Boston Terminal Company is in no sense an underlying company, and the obligation was imposed because of the Massachusetts Act of 1896 and not merely by private contract.

2. Section 124 requires the New Haven trustees to comply with the Massachusetts Act of 1896 and the order of the Department of Public Utilities thereunder by paying the prescribed expenses of the Boston Terminal.

28 U.S.C.A., Section 124 provides as follows: "Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." A criminal penalty is also provided for violation of this statute. While it is true that the language of Section 124 differs from that of 124a in that "trustee" is not specifically mentioned, it is clear that even though this section uses only the words "receiver" or "manager" in possession

of any property, the Congress did not intend that trustees operating a business under the control of a Federal court should be exempt from the requirements of the valid laws of the state in which the property concerned is situated, even though they may technically be named trustees rather than receivers or managers.

Converse v. *Massachusetts*, 101 F. (2d) 48, 51 (C.C.A. 2d, 1939), aff'd 308 U.S. 79 (1939).

Palmer v. *Massachusetts*, 308 U.S. 79, 90, n. 17 (1939).

The Circuit Court of Appeals in its opinion in this proceeding states: "The statute speaks of a 'receiver or manager in possession of any property' and refers to the duty to 'manage and operate such property.' It cannot be gainsaid that the New Haven trustees are in possession, and managing and operating the properties, of the Old Colony and the Boston and Providence. The words 'receiver or manager' are broad enough to refer to any court officer performing these functions." (R., p. 195.)

While the respondent vigorously contends that the use of the Boston Terminal facilities is by the New Haven trustees themselves directly, nevertheless, even if we adopt the assumption that the New Haven trustees are using such facilities only through their operation of the lines of the Boston and Providence and the Old Colony under Section 77 (c) (6) it cannot be disputed that in one capacity or another the New Haven trustees are using the Boston Terminal and therefore bound by the provisions of Section 124 to comply with the Massachusetts Act of 1896. As has been previously pointed out, to the extent that this Massachusetts statute requires the railroads named by it to use the Boston Terminal and to pay for such use in the manner determined by the statute, it is undoubtedly a valid exercise of the police power of the Commonwealth (Brief of the respondent, p. 24).

As the Circuit Court of Appeals in this proceeding states: "Section 124 may not require compliance with any and all state laws, but it does require compliance with this particular Massachusetts statute. It is beyond question that state statutes relating to speed of trains, abandonment of lines, liability for negligence, the medium in which wages are paid, and other similar police regulations must be obeyed by the receivers of a railroad. *Erb* v. *Morasch*, 177 U.S. 584; *Pittsburgh & Shawmut Coal Co.* v. *Delaware & N. R. Co.*, D.C. N.D. N.Y., 289 F. 133; *Hornsby* v. *Eddy*, 8 Cir., 56 F. 461; *Pierce* v. *Van Dusen*, 6 Cir., 78 F. 693; *Converse* v. *Massachusetts, supra; Burke* v. *Morphy*, 2 Cir., 109 F. 2d 572. Compliance with these laws in no way interferes with the federal equity and bankruptcy powers upon which the reorganization of railroads is based." (R., p. 195.)

Until such time as the Massachusetts Act of 1896 has been amended or repealed it must be obeyed. As stated by the Circuit Court of Appeals, the record in this case presents no evidence that this law is invalid or the charges established by it unreasonable (R., p. 196).

The petitioners concede that Section 124 describes the New Haven trustees (Petitioners' brief, p. 34) but attempt to remove themselves from its express provisions, first upon the theory that the payment of compensation for the use of the Boston Terminal as prescribed by the Massachusetts Act of 1896 and the order of the Department of Public Utilities thereunder is not an expense indispensable to operation. Here the petitioners fall into the same error which apparently confused the judge of the District Court, as pointed out above, on page 37 of this brief. It is mandatory, by the terms of the Massachusetts Act, that the railroads named in that Act use the Boston Terminal for all of their terminal business. This use is an indispensable part of the operation by the New Haven under the provisions of

Section 77 (c) (6) of the lines of the Old Colony and the Boston and Providence. It is a necessary incident of this mandatory use of the terminal that the users pay the expenses expressly prescribed by Sections 10 and 25 of the Massachusetts Act. The only question of indispensability arises in considering whether there is an obligation to use the terminal, and the petitioners do not question the obligation of the railroads operated by the New Haven trustees to use the terminal. This having been established, compensation for such use must be paid and must be paid in accordance with the Massachusetts statute. It is not proper to describe certain elements of the statutory compensation for use as not indispensable and no issue of this sort is, in fact, raised by the instant case.

To reach the position taken by the petitioners, it is necessary for them to assume not only that a part of the statutory compensation for the use of the terminal is nonessential, but having made this assumption, they must further torture Section 77 (c) (6) into authorizing them to disregard the provisions of a valid state statute, if the costs imposed by that statute be considered by a district judge not to be indispensable to the operations under Section 77 (c) (6). Any such construction by implication is clearly unwarranted.

Palmer v. *Massachusetts*, 308 U.S. 79 (1939).

The second reason advanced by the petitioners to demonstrate that Section 124 does not require obedience to the Massachusetts Act of 1896 with respect both to use and to payment for that use is that to pay interest upon the Terminal Company's bonds would constitute a preference. In so arguing, the respondents treat the obligation to pay currently for current use as if the petitioners were being asked to pay a debt of the New Haven which arose prior to the bankruptcy. All of the items involved in the present case represent current charges,—prior charges have been

paid by the New Haven trustees (R., p. 188). The payment by the New Haven trustees for current use of the terminal facilities is no more a preference than the payment by the New Haven trustees of wages incurred in operating the lines of the Old Colony and the Boston and Providence, (*Burke* v. *Morphy*, 109 F. (2d) 572 [C.C.A. 2d, 1940]) of paying for repairs upon those roads or the payment of their office expenses. (In fact, the offices in Boston of the New Haven, the Old Colony and the Boston and Providence are upon the premises of the Boston Terminal and have been and are being used as such by the bankrupt companies.) The petitioners attempt to treat the payment of the expenses of the Terminal Company (including its bond interest and franchise taxes) just as though they were dealing with the interest upon bonds issued by the Old Colony or by the Boston and Providence. This argument of the petitioners may be sound with reference to such bonds but has no applicability whatsoever to the payment of compensation for the use of the Boston Terminal as prescribed by the Massachusetts Act of 1896.

H. THE INTERPRETATION MADE BY THE CIRCUIT COURT OF APPEALS OF SECTION 124 AND SECTION 124a TAKEN IN CONNECTION WITH SECTION 77 (c) (6) DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The petitioners argue that the Boston and Providence and the Old Colony are primarily responsible under the Massachusetts Act of 1896 for the compensation to be paid to The Boston Terminal Company for the use of the terminal facilities. Momentarily conceding that contention, the respondent replies that the New Haven trustees, as actual managers and policy determiners of the Old Colony and Boston and Providence, by virtue of Section 77 (c) (6) are responsible to the Terminal Company and to the City of

Boston for compensation for the use of the terminal facilities because Congress has so provided in 28 U.S.C.A., Sections 124 and 124a. As so interpreted, Sections 124 and 124a do not violate the Fifth Amendment to the Constitution of the United States.

The petitioners attempt to focus attention upon the alleged separation of the New Haven on the one hand and the Old Colony and the Boston and Providence on the other. To do this is violative of reality, inasmuch as it ignores the background of the present situation. It is imperative to understand that the Boston and Providence and the Old Colony are not, and have not been for over forty years, operating railroads. The New Haven brought about this situation by its own voluntary act. The lessors became component parts of the New Haven system by virtue of the lease taken by the New Haven. They continued to be component parts of the New Haven system. No separate accounts for the Boston and Providence and the Old Colony were kept by the New Haven prior to 1935 (R., p. 66). The Interstate Commerce Commission does not require separate accounts for the component portions of a railroad system.

> *New York, New Haven and Hartford Railroad Company Reorganization*, 224 I.C.C. 723, 724 (1938).

Accordingly, it was impossible to determine whether the Boston and Providence and the Old Colony were drags upon or valuable contributors to the system, so amalgamated was that system. Indeed, such an analysis of the component parts was not essential because the New Haven, by its own action, had created this integrated system by its lease of the Old Colony for ninety-nine years (R., p. 72).

After the New Haven bankruptcy and the subsequent rejection of the Old Colony and the Boston and Providence leases, there was nothing else that could be done except to have the former lessee continue to operate the lines of the

former lessors. If we "think things" instead of words, the dependence of the Old Colony and Boston and Providence upon the New Haven and the New Haven trustees is apparent, even after the so-called separation of the railroads by the lease rejections; the Boston and Providence and Old Colony, having been deprived by the New Haven of operating virility, had to rely on the New Haven trustees to operate the system as before the lease rejection, under Section 77 (c) (6). All that 28 U.S.C.A., Sections 124 and 124a added was that in continuing operation as before, the trustees of the lessee must abide by all valid state laws and continue to be obligated to pay state and local taxes, just as the lessee was before. Congress, in the exercise of its bankruptcy power, could have refused entirely to permit the lessee to reject leases. Relief from obligations is by legislative grace. Such grace may be extended subject to conditions, especially where the burden of the conditions is far less onerous than the burden from which escape is afforded. Congress may relieve some debtors and not others.

Campbell v. *Alleghany Corporation*, 75 F. (2d) 947, (C.C.A. 4th, 1935) *cert. denied*, 296 U.S. 581 (1935).

Congress may relieve from some debts without relieving from all debts. By Section 77 (c) (6), Congress has simply extended to the lessee the privilege to disaffirm its lease obligations, conditioned upon continued operation of the lessor lines by trustees if required by the court, and until abandonment is authorized by the Interstate Commerce Commission. 28 U.S.C.A., Sections 124 and 124a require such continued operation to be in conformity with valid state laws. Such a condition is clearly constitutional.

United States v. *Lowden*, 308 U.S. 225, 240 (1939).

Here Congress has merely recognized reality, by placing upon the lessee for a limited time the duty of continuing to

operate the lessor railroad, just as it had done before the lease rejection, not primarily for the benefit of the lessor but in the public interest. The petitioners' contention as to the unconstitutionality of this legislation is, in essence, a complaint that Congress did not completely relieve the debtor from the obligations which the debtor itself assumed to fulfill. Refusing to relieve a debtor of a fraction of its assumed obligations cannot, by sleight of word, be twisted into a constitutional deprivation of the debtor's property without due process of law.

Fort Smith Light and Traction Co. v. *Bourland*, 267 U.S. 330 (1925).

The legislative mandate requiring the lessee temporarily, and in the interests of the public, to fulfill its self-imposed obligation to operate the lessor lines in accordance with law raises no question of reasonableness or unreasonableness. Nevertheless if this issue were relevant it is clear that such a mandate cannot be deemed unreasonable. The situation here presents far less ground for complaint than the situation where a railroad is ordered to do at a loss that which it bound itself to do by its own charter.

Missouri Pacific Ry. v. *Kansas*, 216 U.S. 262, 279 (1910).

Colorado v. *United States*, 271 U.S. 153, 161 (1926).

In the present case the trustees of the New Haven pay less than if the original obligation were enforced.

Here, just as in *Dayton-Goose Creek Rwy.* v. *United States*, 263 U.S. 456 (1924), which case upheld the recapture of earnings provision of the Transportation Act of 1920, it is not a constitutional violation for Congress to route railroads receipts into the channels deemed by it to assure

an adequate and efficient transportation system. As in the *Dayton-Goose Creek* case, the contention here that the petitioners' earnings would be used to pay another's obligations glosses over the fact that the earnings are attributable not to any *one* railroad but to a railroad *system*. Section 77 (c) (6), in conjunction with Sections 124 and 124a, sensibly enunciates a policy of applying system earnings to system obligations which in the instant case are current charges of operation, even after the unscrambling of the system by the lease rejections, which unscrambling is a legal concept and not a fact; actually, here, the system continued to exist and still does exist.

Furthermore, the operation of the leased lines in conformity with valid state law, exactly as has been done for more than forty years, is only a temporary requirement by Section 77 (c) (6) and is proper in order to protect the interest of the public against sudden and unwarranted cessation of service. The requirement that the lessee operate the lessor lines is merely incident to the reorganization of the lessee. Legislation of a temporary nature in the interest of the public may well be justified, even though it could not be upheld as a permanent measure.

Block v. *Hirsh*, 256 U.S. 135, 157 (1921).

Section 77 (c) (6) specifically states that the lessor lines may be abandoned by the lessee, with the consent of the Interstate Commerce Commission. Significantly, the abandonment of the Boston and Providence would deprive the New Haven of its sole entrance to Boston through Providence as a part of its main shore line route. Again, the obligation to operate the lessor lines exists only so long as these lines are incapable of self-operation. Finally, even if the obligation to operate the lessor lines continues, the

lessee in such operation may not be obliged to obey certain state laws if and when such laws are abrogated in a plan of reorganization approved by the Interstate Commerce Commission and confirmed by the court under Sections 77 (d) and 77 (f) of the Bankruptcy Act.

The petitioners on page 45 of their brief draw a rather obvious red herring across the trail when they argue that the solution of all of the problems presented in this case is the reorganization of the Terminal Company. Very obviously the petitioners do not want to abandon the use of the Boston Terminal. Their hope is to continue the use of the Terminal without paying the statutory compensation for its use. As the respondent has pointed out in this section the obligations imposed by Section 77 (c) (6) and by Sections 124 and 124a are clearly justifiable both because they are a condition to other relief sought by the debtor and because they are necessarily impermanent in their nature. It is reasonably clear that the approval by the Interstate Commerce Commission of a plan of reorganization of the New Haven and the carrying out of such a plan under the direction of the District Court would remove from the petitioners the burdens properly imposed upon them by Section 77 (c) (6) and Sections 124 and 124a. In the meantime the petitioners cannot avoid the obligations imposed upon them by Federal and State statutes by complaining that The Boston Terminal Company should be reorganized. That sort of complaint is putting the cart before the horse.

The statements made by the petitioners with reference to the initiation of a reorganization plan of the Terminal Company fail to present the complete facts. The reason for the statements of the petitioners is apparently to minimize the importance of the instant case.

On the petition of the petitioning creditors and later of

the Terminal Company, Judge Ford of the United States District Court for the District of Massachusetts has twice extended the time within which the Debtor may file a plan of reorganization. Therefore no plan of reorganization has been filed by the Debtor. The only plan of reorganization filed anywhere was filed by the Trustees in Bankruptcy of Old Colony Railroad Company—they being the same individuals as the trustees of the New Haven. The sub-joined footnote explains the present status of this plan.[13]

In short, it is not unconstitutional for Congress to require a railroad, temporarily, in the interest of the public service to continue to do that which it agreed to do and has been doing for many years. There is no constitutional principle requiring Congress to relieve bankrupts from all their obligations, especially those self-imposed.

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[13] On May 3, 1940, pending the return of an Order of Notice issued by the District Court for the District of Massachusetts on a petition by creditors of the Terminal Company to extend the time for filing the debtors' plan of reorganization in the District Court and to enjoin the filing of the debtors' plan during the extension, and after the Judge of the District Court had personally informed counsel for the Old Colony and New Haven trustees that no plan should be filed until after hearing on the said petition, the trustees of the Old Colony (who are the identical individuals who are the trustees of the New Haven) filed in the District Court of Massachusetts a plan of reorganization as stockholders of the Terminal Company and on the same day filed a copy of the plan with the Interstate Commerce Commission. On May 6, 1940, which was the return date of the said Order of Notice, the District Court after hearing, extended the time for filing the debtors' plan of reorganization until further order of the court. On the same day, on petition of the present respondent, after notice to the trustees of the Old Colony (and of the New Haven) as well as to other parties in interest, and after hearing, the District Court ordered the plan filed by the trustees of the Old Colony to be struck from the files of the Court as not properly filed therein under the provisions of Section 77 of the Bankruptcy Act and the General Orders in Bankruptcy promulgated by this Court. The trustees of the Old Colony acquiesced in this order but later requested the Interstate Commerce Commission to forward to the District Court for the District of Massachusetts a copy of the plan as filed with the Interstate Commerce Commission on May 3rd. After some delay, this request was complied with but the Clerk of the District Court in Massachusetts, on advice of the Court, refused to accept such copy for filing on the ground that in the circumstances no plan was properly pending before the Interstate Commerce Commission. Just prior to the expiration of the first extension a second extension was granted by the Court upon application of the debtor as well as of its creditors in order to await the decision of this Court.

VII.

CONCLUSION.

It is respectfully submitted that the judgment of the Circuit Court of Appeals for the Second Circuit should be affirmed and that Order No. 398 of the District Court for the District of Connecticut should be reversed.

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APPENDIX.

MATERIAL PROVISIONS OF THE STATUTES.

UNITED STATES STATUTES.

Transportation Act of 1940, Section 3 (5):

"If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be."

MASSACHUSETTS STATUTES.

Massachusetts Acts and Resolves of 1896, Chapter 516, sections 1 to 8 inclusive:

"SECTION 1. Charles F. Choate, William Bliss, William T. Hart, Royal C. Taft, and Charles P. Clark, their associates and successors, are hereby make a corporation by the name of The Boston Terminal Company, with power to construct and maintain a union passenger station in the southerly part of the city of Boston, and to provide and operate adequate terminal facilities for the several railroad companies hereinafter authorized to hold the stock of said terminal company, and for the accommodation of the public in connection therewith.

"SECTION 2. The capital stock of said corporation shall be five hundred thousand dollars, and the Boston and Albany Railroad Company, the New England Railroad Company, the Boston and Providence Railroad Corporation, the Old Colony Railroad Company, and the New York, New Haven and Hartford Railroad Company, being lessee of the Old Colony Railroad Company, may each subscribe for and hold one fifth portion of the said capital stock. The corporation may by by-laws regulate the terms and conditions upon which its stock may be transferred. All said capital stock shall be paid in in cash by said railroad companies before the corporation takes any land under the provisions of this act.

"SECTION 3. The immediate government and direction of the affairs of said terminal company shall be vested in a board of five trustees, to be appointed at once on the organization of said company, one of whom shall be appointed by each of said railroad corporations from its directors, to hold office as such trustee at the pleasure of the corporation by whom he is so appointed; any vacancy to be filled in like manner. The trustees shall elect one of their number to be chairman, and may elect another to be vice chairman, and

shall choose a clerk who shall be sworn, and a treasurer who shall give bond in the sum required by the by-laws, with surety, for the faithful discharge of his duties."

"SECTION 4. Said terminal company, to provide means to carry out the purposes of this act, may from time to time issue coupon or registered bonds, in sums of not less than one hundred dollars each, payable at periods not exceeding one hundred years from the date thereof, bearing interest not exceeding four per cent. per annum, payable annually, semi-annually, or quarterly to such an amount as may be necessary and as may be approved by the board of railroad commissioners. No bonds shall be issued unless approved in writing by at least three of the trustees of the corporation. Said corporation may mortgage or pledge as security for the payment of such bonds or of any bonds given in renewal thereof, a part or all of its real estate and other property. In case any mortgage made to secure bonds issued by the terminal company under the provisions of this act shall be foreclosed, and there shall not be thereby realized a sum sufficient to pay all the then outstanding bonds secured by said mortgage, said railroad companies shall be held liable to pay any deficiency in the amount required to pay all of said bonds and the interest thereon in such proportions as may be just and equitable, having regard to the use which they or their lessees may have respectively had of the mortgaged property; and the supreme judicial court shall have jurisdiction in equity to determine such proportions and to compel such payments to be made, so that the full payment of the principal and interest of bonds issued under the provisions of this act by the terminal company shall not in any event fail. Any such mortgage shall be made to a trustee or trustees approved in writing by the board of savings banks commissioners, and savings banks and institutions for savings may invest in such bonds when so secured.

"SECTION 5. Said terminal company may purchase or otherwise take in fee the whole or any part of the land in the city of Boston within the following limits, that is to say:—Beginning at the easterly corner of Atlantic avenue and a way called Summer street, thence bounded by the northerly line of said way extended to Fort Point channel; thence by said channel to Broadway; thence by Broadway to the westerly line of Lehigh street; thence by the westerly line of Lehigh street and by South street, Kneeland street and the westerly line of (street extended to Federal street; thence by the westerly of Federal street to Summer street, and thence across public ways to the point of beginning; and may discontinue and occupy for its purposes all streets and rights of way embraced within the land so acquired: *provided, however,* that no land belonging to the Boston and Albany Railroad Company or to the Old Colony Railroad Company shall be taken by said terminal company without the consent of the directors of both of said railroad companies; and *provided, further,* that the portion of Federal street to be discontinued under the provisions of this act shall not be closed to travel prior to the completion of the extension of Summer street and the extension of Dorchester avenue hereinafter provided for, and the opening of the same to travel, unless a temporary provision for travel over such portion of Federal street, so that the travel shall not be interrupted, is provided for in some manner approved by the mayor, such temporary accommodation to continue until the completion of said Dorchester avenue and Summer street, and *provided, further,* that if said terminal company shall take for the purpose of this act any part of the land within the limits before described, owned by the Boston Gas Light Company, it shall take the whole of the land owned by said Boston Gas Light Company within said limits.

"SECTION 6. Said terminal company, upon the passage of this act, shall forthwith organize, and thereupon the trus-

tees thereof shall at once prepare plans and specifications for the construction of a union passenger station upon land herein-above authorized to be taken, adequate for the business to be accommodated, and of such construction as may be best adapted for the accommodation of the companies and of the public, exhibiting its form, dimensions of walls, rooms and partitions, and arrangements, and its location with reference to the adjacent streets and to the tracks of all said railroad companies located or proposed to be located in the vicinity thereof, and any projections over adjacent streets, so far as practicable, and shall submit said plans when completed to the mayor of Boston for his approval, who shall forthwith approve or disapprove them in writing. The trustees shall then at once submit said plans to the board of railroad commissioners for its approval, and said board, after notice to the railroad companies and to the mayor of Boston, and a hearing, shall approve the plans, or order such changes thereof as in their judgment the safety and convenience of the public and the interests of all said railroad companies require. Said station shall be constructed by the terminal company according to the plans thus approved by the board of railroad commissioners, or as the same may be changed, as hereinafter provided. The supreme judicial court, or any justice thereof, shall have jurisdiction in equity to enforce the provisions of this section.

"Section 7. Said terminal company, within three months after the plans of said union station are approved as above-provided, shall file in the registry of deeds for the county of Suffolk a location of the lands hereby authorized to be taken by it, or of such part thereof as it then deems it necessary to acquire, and shall proceed with all reasonable diligence to the construction and completion of such union passenger station according to said plans. But the trustees of the terminal company may from time to time propose to the mayor

of Boston any changes in said plans, and the mayor shall forthwith approve or disapprove such changes in writing, and the trustees shall then at once submit such changes to the board of railroad commissioners, who, after notice to the mayor and to the railroad companies, and a hearing, shall approve the same, or order such modifications thereof as in their judgment the safety and convenience of the public and the interests of all said railroad companies require.

"SECTION 8. Said terminal company, upon the completion of said union passenger station and grounds, shall make reasonable rules and regulations for their use; and the board of railroad commissioners, upon the application of either of said companies or of the mayor of the city of Boston, and hearing may, from time to time, make any modification of such rules and regulations which they may deem just and reasonable. Such rules and regulations shall be binding upon all corporations and persons in the use of said station and grounds, and shall be enforced by railroad police officers who may be appointed upon the application of the terminal company, in the same manner and with the same powers in said station and grounds, and with like liability of the terminal company for their acts, as railroad police officers under the general law."

Massachusetts Acts and Resolves of 1921, Chapter 363:

"SECTION 1. Section two of chapter five hundred and sixteen of the acts of eighteen hundred and ninety-six is hereby amended by inserting after the word "Company", in the third line, the words:—its lessee, the New York Central Railroad Company,—and also by inserting after the word "for", in the eighth line, the words:—or purchase,—so as to read as follows:—*Section 2.* The capital stock of said corporation shall be five hundred thousand dollars, and the Boston and Albany Railroad Company, its lessee, the New York Central Railroad Company, the New England Rail-

road Company, the Boston and Providence Railroad Corporation, the Old Colony Railroad Company, and the New York, New Haven and Hartford Railroad Company, being lessee of the Old Colony Railroad Company, may each subscribe for or purchase and hold one fifth portion of the said capital stock. The corporation may by by-laws regulate the terms and conditions upon which its stock may be transferred. All said capital stock shall be paid in in cash by said railroad companies before the corporation takes any land under the provisions of this act.

"SECTION 2. During the existence of the lease of the Boston and Albany Railroad to the New York Central Railroad Company authorized by chapter four hundred and sixty eight of the acts of nineteen hundred, the New York Central Railroad Company shall exercise all the powers conferred upon the Boston and Albany Railroad Company under the provisions of said chapter five hundred and sixteen of the acts of eighteen hundred and ninety six, as amended

General Laws of Massachusetts (Tercentenary Edition), Chapter 160:

"SECTION 128. A railroad corporation which has established and maintained a passenger station throughout the year for five consecutive years at any point upon its railroad shall not abandon such station, unless it is relocated under the following section, nor substantially diminish the accommodation furnished by the stopping of trains thereat as compared with that furnished at other stations on the same railroad, except with the written approval of the department after notice posted in and on said station for a period of thirty days immediately preceding a public hearing thereon.

"SECTION 129. A railroad corporation may relocate passenger stations and freight depots, with the written approval of the department and of the board of aldermen of the city or the selectmen of the town where such stations or depots are situated."

Massachusetts Acts and Resolves of 1901, Chapter 330:

"SECTION 1. All general laws defining the powers and duties of the board of railroad commissioners in reference to the stations and premises of railroad companies, and to the operation of trains in connection therewith, shall, except as otherwise provided in chapter five hundred and sixteen of the acts of the year eighteen hundred and ninety-six, be applicable to the station and premises of the Boston Terminal Company, and to the operation of trains in connection therewith.

"SECTION 2. This act shall take effect upon its passage."

Order of the Department of Public Utilities of the Commonwealth of Massachusetts, dated July 17, 1931.

"(D.P.U. 4099) Petition of The New York, New Haven and Hartford Railroad Company that the Department determine the proportions in which the New York Central Railroad Company, lessee of the Boston and Albany Railroad, and The New York, New Haven and Hartford Railroad Company have the use of the Union station of The Boston Terminal Company in the city of Boston.

"Under the provisions of section 10 of chapter 516 of the Acts of 1896, the railroad companies required to use the South union station shall pay to the terminal company, for such use, in monthly payments, such amounts as may be necessary to pay the expenses of its corporate administration and of the maintenance and operation of said station and of the facilities connected therewith and owned by said terminal company, including insurance and all repairs, all taxes and assessments which may be required to be paid by said terminal company, the interest upon its bonds or other obligations issued under the provisions of the act as the same shall become payable, and a dividend, not to exceed

four per cent per annum, upon its capital stock. Each of the railroad companies shall pay for such use of said station and facilities in the proportion in which it has the use thereof, the same to be fixed by the written agreement of the railroad companies, and, in case they fail to agree, the Board of Railroad Commissioners, of which this Department is the successor, shall determine such proportions upon the application of said terminal company or of any of the railroad companies. Such proportions as thus fixed, either by agreement or by determination, may be revised and altered from time to time in like manner at intervals of not less than three years. The decisions of the Board of Railroad Commissioners, and its successors, fixing said proportions of payments, shall be final and binding upon the railroad companies.

"The petitioner in this case is one of the original railroad companies required to use the said union station. In addition, it is successor to the New England Railroad Company and is lessee of the Old Colony Railroad and of the Boston and Providence Railroad. In 1922, the said proportions of use were fixed by agreement, the petitioner's being 72 per cent and the New York Central Railroad Company, as lessee of the Boston and Albany, being 28 per cent.

"These proportions have remained without revision or alteration since that time, but the parties have agreed to their revision, to be effective as of January 1, 1930. They have not, however, been able to agree upon the proportions in which each company has the use of the stations and facilities, and this petition is for this Department to determine such proportions under the provisions of said section 10, chapter 516, Acts of 1896.

"The original agreement (1899) provided that the proportions be fixed upon a basis of six factors. In 1902, two of these were eliminated, and the agreement of 1922 was based on the four factors of number of passengers, number of

tickets sold, number of trains handled, number of pieces of baggage handled.

"At the hearing, petitioner's counsel contended that the fairest method of determining the proportion of use was on the basis of car and engine entrances, similar to that in use at Grand Central Terminal, New York, although it was conceded it should be limited to 'live' cars and not empty draughts, so-called, in view of the difference in handling draughts by the two roads. This would be in substitution of the factor of number of trains handled, heretofore used.

"The petitioner further contended that, if this method did not meet with the approval of the Department, there should be a separation of the facilities between strictly passenger station building and track facilities covering operation and handling of trains as a terminal railroad. It was further suggested that the station building should be separated into passenger station facilities and baggage room facilities, including mail and express. The factor of tickets sold or number of passengers, or both, would be used as the basis of the passenger station expenses, except that part of the station used for handling baggage, mail and express. The factor of cars and engines handled would be used as the basis of yard and track expenses.

"It was further argued by the petitioner that if the latter method were adopted the proportion of use should be based on a weighted average, rather than by adding together the proportions of the factors used and dividing by the number of factors.

"We are of the opinion that two of the factors used in the past can be eliminated with fairness to both parties and in the interest of simplicity.

"The number of passengers using the station would seem to be a better indication of the use of the station than the number of tickets sold, since many persons use the station regularly who buy their tickets elsewhere.

"The amount of baggage handled, also, would seem to be adequately covered both by number of passengers and number of cars. If baggage were included logically mail and express should also be included, and the difficulties involved in making accurate counts would be out of all proportion to the effect, if any, they would have on the more important factors. This would be particularly true if weighted averages were used. This leaves the two factors of car and engine entrances and the number of passengers as factors.

"While it is probably true that the number of car and engine entrances is the sole factor in the majority of terminal stations of Class A railroads in the country, we think that number of passengers is an important factor, and should be given consideration.

"Determining, therefore, these two factors, of number of passengers and number of 'live' car and engine entrances, as the ones to be considered in this case, the next question arises as to whether the proportion of use should be determined by adding the two proportions of these factors together and dividing by two, or whether the relative proportion of the number of passengers as between the two railroads should be allocated to the passenger station building and the number of 'live' cars and engine entrances should be allocated to the yard and track facilities and a weighted average of the two factors taken as a basis for a proper proportion of the use.

"From the evidence submitted, the proportion as between the two roads with respect to the number of passengers would appear to be New Haven 73%, Boston and Albany 27%. With respect to the number of live cars and engine entrances, it would appear to be New Haven 67%, Boston and Albany 33%. Adding these two together and dividing by two, we have a proportion of use of New Haven 70%, Boston and Albany 30%.

"Applying a weighted average on the basis of the original cost of the passenger station and the yard and track facilities according to allocations submitted in evidence by the New Haven Railroad and disputed by the Boston and Albany Railroad, the proportion of use would be New Haven 69% and Boston and Albany 31%.

"If applied on the basis of expenses allocated to the passenger station and the yard and track facilities according to such evidence, it would be approximately the same proportions, slightly over 69% for the New Haven and slightly less than 31% for the Albany.

"While there is much to be said for the theory that the number of passengers' use should be allocated to the passenger station and the number of car and engine entrances' use should be allocated to the yard and track facilities, and it may well be more logical to thus deal with it, can be also argued that after all it is a single unit of property and the various kinds of use are more or less interlocked. Having in mind the possible one per cent difference in result in applying the two methods, there is an additional factor to be considered. In the evidence submitted as to number of passengers averaged over a period of three years, the counts included passengers getting on and off at Back Bay station and passengers getting off at Huntington Avenue and getting on at Trinity Place stations. If the counts had been confined to passengers using the South Station exclusively, as we believe it should, particularly if the weighted average method is used, there would without question be a change in the percentages favoring the Boston and Albany. We are of the opinion that this change would offset this one per cent difference as between the two methods.

"Bearing in mind this fact, we do not believe the result to be obtained by attempting an allocation as between the station and the yard and track facilities either on the basis of

original cost or of expenses would justify the cost or warrant the time required for such purpose.

"In fact, with such a slight probability of any material change being accomplished by such an allocation, it would seem rather impracticable to become involved in all manner of disputes as to whether certain items should be credited to the station or the yard, and, if recognized as elements in both, the proper prorating as between the two. Hence we have disregarded the use of the weighted average at this time.

"It was suggested by the petitioner that the Department could, under the statute, set up a formula by the use of certain factors whereby the railroad companies should pay the Terminal Company such sums as might be determined at stated times. Even if that be true, we do not believe it should be done in this case, in view of the difficulty in making accurate counts from time to time as was indicated by some of the evidence submitted at the hearing, the cost thereof, and the further fact that since this decision is retroactive to January 1, 1930, application may be made by either party for a revision and alteration of the proportions within a year and a half if conditions should materially change.

"Certain requests for rulings of law were made by both parties. We deny all of said requests except to the extent they have been granted in the decision, with the exception of numbers 1, 3, 6, and 7 of the New York, New Haven and Hartford Railroad Company's requests, and numbers 1, 4 and 5 of the Boston and Albany Railroad Company's requests, which are granted in so far as they may be material.

"Accordingly, after public hearings, the Department

"DETERMINES that the proportions of use of the South Union Station and facilities be fixed at seventy per cent (70%) of use by The New York, New Haven and Hartford Railroad Company and thirty per cent (30%) of use by the

New York Central Railroad Company, lessee of the Boston and Albany Railroad.

By order of the Department

(signed) ALLAN BROOKS,
Administrative Secretary.

Commissioners participating in the above decision (D.P.U. 4099) were:

Chairman Atwill
Commr. Stone
" Hardy
" Wells
" Goldberg"